No. 89-478-CSY
Status: GRANTED

Title: Maryland, Petitioner
v.
Sandra Ann Craig

Docketed:
September 22, 1989

Court: Court of Appeals of Maryland

Counsel for petitioner: Bair,Gary E.

See also:
89-260
89-296
89-5396

Counsel for respondent: Gutierrez,Maria Cristina

Entry	Date	Note	Proceedings and Orders
1	Sep 22 1989	G	Petition for writ of certiorari filed.
3	Oct 23 1989	G	Motion of National Association of Counsel for Children, et al. for leave to file a brief as amici curiae filed.
4	Oct 23 1989	G	Motion of People Against Child Abuse, Inc., et al. for leave to file a brief as amici curiae filed.
2	Oct 24 1989		Brief amici curiae of Florida, et al. filed.
5	Oct 25 1989		DISTRIBUTED. November 9, 1989
6	Nov 7 1989	F	Response requested -- CJ, BRW, SOC.
7	Dec 7 1989		Brief of respondent Sandra A. Craig in opposition filed.
8	Dec 7 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Dec 13 1989		REDISTRIBUTED. January 5, 1990
11	Jan 8 1990		REDISTRIBUTED. January 12, 1990
12	Jan 16 1990		Motion of National Association of Counsel for Children, et al. for leave to file a brief as amici curiae GRANTED.
13	Jan 16 1990		Motion of People Against Child Abuse, Inc., et al. for leave to file a brief as amici curiae GRANTED.
14	Jan 16 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
15	Jan 16 1990		Petition GRANTED.
			**********
16	Feb 15 1990		Record filed.
		*	Certified copy of original record and exhibits, 3 boxes,received.
17	Feb 23 1990		SET FOR ARGUMENT WEDNESDAY, APRIL 18, 1990. (1ST CASE)
25	Mar 1 1990		Brief amicus curiae of Appellate Committee of the CA District Attorneys Assoc. filed.
19	Mar 2 1990		Brief amicus curiae of American Psychological Assn. filed.
20	Mar 2 1990		Joint appendix filed.
21	Mar 2 1990		Brief of petitioner Maryland filed.
23	Mar 2 1990		Brief amicus curiae of Stephanie Roper Foundation filed.
24	Mar 2 1990		Brief amici curiae of People Against Child Abuse, et al. filed.
26	Mar 2 1990		Brief amici curiae of National Association of Counsel for Children, et al. filed.
27	Mar 2 1990		Brief amici curiae of Florida, et al. filed.
28	Mar 2 1990	X	Brief amici curiae of District Attorney of Kings County, NY, et al. filed.
29	Mar 2 1990	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.

No. 89-478-CSY

Entry	Date	Note	Proceedings and Orders
30	Mar 23 1990		CIRCULATED.
34	Mar 29 1990	X	Brief amicus curiae of National Assn. of Criminal Defense Lawyers filed.
31	Mar 30 1990	X	Brief of respondent Sandra A. Craig filed.
35	Mar 30 1990	X	Brief amicus curiae of Richard Gardner, M.D. filed.
37	Mar 30 1990	X	Brief amici curiae of Illinois Public Defender Assn., et al. filed.
32	Apr 2 1990	D	Application (A89-687) by respondent to file a brief on the merits in excess of page limits, submitted to The Chief Justice.
33	Apr 2 1990	X	Brief amicus curiae of Victims of Child Abuse Laws (VOCAL) Natl. Network filed.
38	Apr 2 1990	X	Brief amicus curiae of Institute for Psychological Therapies filed.
36	Apr 3 1990		Application (A89-687) denied by the Chief Justice.
39	Apr 11 1990	X	Reply brief of petitioner Maryland filed.
40	Apr 18 1990		ARGUED.

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89-478
No. - -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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103 pp

QUESTION PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

PARTIES

The caption contains the names of all the parties below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989), reversing Respondent's convictions, is reproduced in Appendix A (1a-21a).

The reported opinion of the Court of Special Appeals of Maryland, *Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988), affirming Respondent's convictions, is reproduced in Appendix B (22a-69a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's convictions was filed on July

24, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Article 21 of the Maryland Declaration of Rights provides in pertinent part: "That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . ."

Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1984 Repl. Vol., 1988 Cum. Supp.) provides:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
>
> (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
>
> (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
>
> (c) The provisions of this section do not apply if the defendant is an attorney pro se.
>
> (d) This section may not be interpreted to preclude, for purposes of identification of a

defendant, the presence of both the victim and the defendant in the courtroom at the same time.

STATEMENT OF THE CASE

During the mid-1980's, Respondent Sandra Ann Craig operated a preschool in Howard County, Maryland. On October 16, 1986, a Howard County Grand Jury indicted Craig for child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. (E. 4).[1] The named victim in each count was Brooke Etze, a child who had attended Craig's preschool from August, 1984 through June, 1986.

In January of 1987, several months before Craig's trial, the State moved to invoke the Maryland procedure whereby a victim of child abuse may testify at trial by one-way closed-circuit television. (E. 40-41). Section 9-102 of the Courts and Judicial Proceedings Articie of the Maryland Code requires that a judge first determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Ann. Code, Cts. & Jud. Proc. Art., § 9-102(a)(1)(ii) (1984 Repl. Vol., 1988 Cum. Supp.). The State sought to invoke this section with respect to Brooke, then seven years old, and also with respect to three younger children who allegedly had been abused by Craig and who were expected to be called as witnesses at Craig's trial.

[1] References to the record herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

At a pre-trial hearing on the State's motion for use of closed-circuit television, experts testified in detail about the traumatic impact on each of the four child witnesses if compelled to testify in front of the defendant at trial. Craig was present at this hearing, and her counsel cross-examined each expert witness.

Mary Burke, a child therapist with the Howard County Sexual Assault Center, testified that she held a Bachelor's degree in child behavior and development and a Master's degree in counseling psychology and human development. (E. 60-62). She explained that she had been working full time with abused children since 1981, providing the victims and their families with counseling and support services. (E. 63). Following *voir dire* by defense counsel, the trial judge ruled that Ms. Burke was qualified to render an opinion on the issue of whether the children would suffer serious emotional distress if they were to testify in the courtroom. (E. 70).

Ms. Burke explained that she had conducted twenty therapy sessions with Brooke Etze, each lasting one to one and one-half hours. (E. 74). When asked whether Brooke would be able to "testify face to face with Mrs. Craig," Ms. Burke opined that "it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents." (E. 75). In explaining the basis for her opinion, Ms. Burke said that Brooke perceives "that she was threatened by Mrs. Craig and that she feels that her life is in jeopardy and part of her family and the household pet." (E. 75-76). Ms. Burke also commented that Brooke "truly believes that those threats will be carried out against her." (E. 75).

In addition to saying that if faced with the alleged perpetrator and others Brooke "would be unable to talk about what happened to her," Ms. Burke stated that Brooke "currently in preparation for the pending hearings is experiencing disruption in her breathing which is definitely manifesting distress and fear and anxiety visible in a physical manner and also an emotional manner." (E. 76). On cross-examination, Ms. Burke added that Brooke would probably stop talking, withdraw, and curl up in a ball if she were forced to testify in Craig's presence. (E. 85).

Ms. Burke also testified with regard to two other child victims, Justin Peeples and Jessie Sue Smith. She related that she had seen Justin, age five, approximately eighteen times for counseling as a result of sexual abuse by Craig. (E. 76-77). She opined that Justin "would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure." (E. 77). Ms. Burke also explained that Justin has difficulty discussing his abuse, and in particular "tends to change the subject which is his manner of avoiding the issue." (E. 78). He also "becomes agitated and depressed, . . . bursts into tears and would be unwilling or unable at that point to proceed." (E. 78). To avoid impairing Justin's ability to communicate and to maximize the opportunity of adducing the child's testimony, it would be necessary "to remove the threatening agent which he perceives as Mrs. Craig." (E. 78).

Jessie Sue Smith, age four, another of Craig's former charges, had been in counseling with Ms. Burke for approximately thirty-six sessions over the course of more than a year. (E. 78, 80). This young child

also perceived Craig as a threat to herself, her parents, and her sibling. (E. 80). As Ms. Burke testified:

> She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations.

(E. 80). Ms. Burke added that it "would be a step-back for Jessie to have to face this person," and that "it would cause her not to share that information." (E. 80-81).

Dr. Gladys Sweeney was called to testify about the ability of a fourth child witness, Drew Woodbury, to testify in open court in Craig's presence. Dr. Sweeney, a clinical psychologist and former faculty member at Johns Hopkins University School of Medicine, related her extensive qualifications in evaluating and treating abused children and, following *voir dire* by defense counsel, was ruled qualified to render an expert opinion on the emotional distress Drew would suffer if forced to testify in open court. (E. 87-92).

Dr. Sweeney explained that she had seen Drew, age five, for approximately nineteen sessions, each lasting about one hour. (E. 92). Noting that Drew had experienced an "extreme level of high anxiety and distress" when talking about Craig's sexual abuse, Dr. Sweeney opined that Drew's "ability to communicate would be grossly impaired if he were to testify in an

open court in the presence of Mrs. Craig." (E. 94). Specifically, she noted that whenever Drew discussed the abuse, he exhibited "extreme regressive behavior, thumb sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kinds of behaviors." (E. 95). During cross-examination, Dr. Sweeney went on to explain that this behavior would be minimized and Drew's chances of communicating clearly would be enhanced if he were allowed to testify outside Craig's presence. (E. 96-99).

Following argument of counsel, the hearing court rejected Craig's contention that her right to confrontation under the Sixth Amendment would be violated by the use of closed-circuit televised testimony. (E. 115). The court ruled that Section 9-102's predicate showings had been made as to each child:

> There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate[2] and accordingly I believe that there's

[2] Although the trial judge spoke in terms of the effect of the children's testifying "in a courtroom," his tracking of the language of Section 9-102(a)(1)(ii) does not mean that he was not addressing the effect of the children's testifying in a courtroom in Craig's presence. As the Court of Special Appeals explained (57a-58a):

> Given the context of the issue, . . .—the State's motion, the evidence given by Ms. Burke and Dr. Sweeney, and the argument of counsel—it is apparent that the court's concern was not so much forcing the children to testify in open court as requiring them to testify in the direct presence of Ms. Craig.

> a need and its appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102 assuming that the child's deemed to be competent to testify and the child's testimony is relevant and of course not otherwise objectionable and assuming those two predicates are met, that is that the child is determined to be competent and that the subject matter of the child's testimony is relevant and not otherwise objectionable, each of the children referred to in the evidence will be permitted to testify by means of closed circuit television consistent with the procedure set forth in Section 9-102.

(E. 116).

Trial commenced on March 16, 1987. (E. 6). Before each of the four child witnesses was permitted to testify, the trial judge conducted a competency evaluation in his chambers. (E. 120-30; 268-79; 300-12; 350-64). The closed-circuit television procedure pursuant to which each child then testified was as follows: Craig and one of her two trial counsel remained in the courtroom with an Assistant State's Attorney, while Craig's other trial counsel and another Assistant State's Attorney were located in the judge's chambers with the child witness and a technician. Craig and defense counsel in the courtroom were able to communicate privately with Craig's counsel in the judge's chambers by telephone. Testimony was broad-

cast into the courtroom where everyone could see and hear it on one or more monitors. Each child witness was cross-examined by Craig's counsel.

The four child witnesses stated that Craig sexually abused them. Brooke related that the defendant kicked her in her "privates" and touched her with a stick between her legs on numerous occasions. (E. 191-93). The three other children testified that Craig perpetrated various other sexual abuses on them. Justin said that Craig "poked" him in the "hiney" with a screwdriver (E. 284-86); Drew related that Craig placed "something cold in [his] behinney" (E. 367); and Jessie told the court and jury that Craig touched her in her "private places" (E. 329).

The testimony of the four children was corroborated by medical evidence. Dr. Charles Shubin, a clinical pediatrician specializing in the field of child sexual abuse, was qualified as an expert. (E. 1795-1819). Dr. Shubin, who had examined the four children, recounted in clinical terms the injuries to Brooke (E. 1821-37), and to the three other children (E. 449-66). Additionally, Dr. Shubin expressed an opinion relating to the pattern of injuries to the genital and anal areas of all four child victims. Dr. Shubin opined that the injuries required an object to be forced into a body opening and that there was a remarkable consistency in the pattern of injuries. He noted that all four children exhibited healed scars in the posterior part of their bodies and that all of the injuries required some degree of mechanical force. (E. 466-67).

On April 2, 1987, the jury returned guilty verdicts on all counts. (E. 9-10). At a subsequent hearing on Craig's motion for a new trial, the defendant asked

the trial court to reconsider the propriety of its ruling on the use of closed-circuit television in the light of a new decision by the Court of Appeals of Maryland.[3] With the benefit of both this decision and hindsight as to the entire trial, the trial court affirmed its prior pre-trial ruling on the use of closed-circuit television for all four child witnesses. (E. 1683-85). On September 21, 1987, the court sentenced Craig to terms totalling ten years' imprisonment on convictions of child abuse, first degree sexual offense, second degree sexual offense, perverted sexual practice, assault, and battery. (E. 8, 13-14).

On appeal, the Court of Special Appeals of Maryland affirmed the judgment of the trial court. (22a-69a). Analyzing Craig's Confrontation Clause challenge in the light of *Coy v. Iowa*, the intermediate appellate court recognized a two-fold compelling state interest in permitting the use of closed-circuit television in child abuse cases:

> Paramount, of course, is the fact that, if the child-victim is actually unable to testify otherwise—if he/she would be "traumatized" by a face-to-face confrontation as to be unable to "reasonably communicate"—the truth of the matter might never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation, perhaps (and,

---

[3] In *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987), the Maryland high court had ruled that Section 9-102 did not violate the federal Confrontation Clause because the statute mandated individualized findings of necessity as to each child before the procedure could be invoked.

> in some instances, likely) upon the same helpless victim. In addition, although somewhat related, the State has an interest in protecting children generally from trauma, especially trauma that would result from the deliberate action of the State itself. Keeping in mind the threshold requirement in § 9-102, what is to be gained from forcing a child-victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child rather than any meaningful evidence—*in*culpatory or *ex*culpatory?

(53a-54a) (emphasis in original). Given the expert testimony regarding the trauma each child would suffer if brought face-to-face with Craig, the trial court's opportunity to observe each child before testifying, and the trial court's post-trial review of the issue, Maryland's intermediate appellate court concluded that the lack of a face-to-face meeting between the children and the defendant did not violate the Sixth Amendment. (56a-58a).

The Court of Appeals of Maryland, reviewing the case on certiorari, reversed Craig's convictions. (1a-21a). Relying upon the Sixth Amendment's Confrontation Clause[4] as construed in *Coy v. Iowa*, the State's

[4] Although the court's opinion contains passing references to Article 21 of the Maryland Declaration of Rights, a provision that is virtually identical to the federal Confrontation Clause, it is clear that the Court of Appeals believed federal law compelled its conclusion. In any event, the court did not indicate that Article 21 provides rights "distinct from, or broader than, respondent's rights under the Sixth Amendment." *Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987). Accordingly, the decision does not rest on an adequate and independent state ground. *Id.*

high court ruled that Section 9-102's closed-circuit television procedure "ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence, and is found by the judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." (16a). Because the four child witnesses were not questioned in Craig's presence, the Court of Appeals reversed, saying: "[A]s we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." (3a).

REASONS FOR GRANTING THE WRIT

The facts of this case lead to the inescapable conclusion that the mandates of the Sixth Amendment's Confrontation Clause, as previously construed by this Court, have not been violated. Because the protection of child abuse victims is an issue of great public import, this Court should take the opportunity to correct the error below, resolve the uncertainty and conflict generated by its decision of *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988), and clarify that individualized findings of the type made by the trial court in the instant case satisfy the Sixth Amendment. In so doing, the Court will necessarily provide guidance to the many state legislatures and courts that are struggling to ensure that child abusers are prosecuted for their crimes, albeit in a manner that satisfies the Sixth Amendment's guarantee of the right to confront one's accuser.

I. The *Craig* Decision Misapplies *Coy* and Conflicts with Earlier Decisions of This Court.

In *Coy v. Iowa*, eight members of this Court[5] considered the constitutionality of a procedure, authorized by Iowa statute, that resulted in the placement at trial of a screen between the defendant and the child-victim witnesses. 108 S.Ct. at 2799. Six Justices held that use of this procedure offended the Sixth Amendment's Confrontation Clause because it was not supported by individualized findings that the witnesses needed special protection. *Id.* at 2803. Two members of the Court, Justices O'Connor and White, wrote separately to stress that the majority decision did not "necessarily doom" efforts by state legislatures to protect child witnesses. *Id.* at 2804.[6] In their view, the right to face-to-face confrontation is "not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." *Id.* at 2803. Justice Blackmun, joined by Chief Justice Rehnquist, dissented on the ground that the Iowa statute was based on an important public policy that outweighed the Confrontation Clause's "preference" for a face-to-face meeting between the accused and the witness. *Id.* at 2808-09.

[5] Justice Kennedy did not participate in the consideration or decision of *Coy*.

[6] In this regard, Justice O'Connor pointed out that many states have attempted to shield child victims through a variety of ameliorative measures, including one- or two-way closed-circuit television and videotaped testimony. 108 S.Ct. at 2804. See also Appendix C, which collects state statutes authorizing one-way closed-circuit television, two-way closed-circuit television, videotaped testimony, and exceptions for hearsay statements of child victims. (70a-74a).

The Maryland statute authorizing the use of a one-way closed-circuit television procedure is significantly different from the statute involved in *Coy*. Its protections cannot be invoked unless "[t]he judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." § 9-102(a)(1)(ii). Furthermore, because the trial judge in the instant case made particularized findings with respect to the need to protect each child witness from having to come face-to-face with Craig, the infirmity that necessitated a new trial for John Coy did not exist in the instant case. Simply stated, the use of the one-way closed-circuit television procedure at Sandra Craig's trial does not run afoul of the narrow holding of *Coy*.

Nonetheless, the Court of Appeals of Maryland has gleaned from *Coy* a requirement that Section 9-102's one-way closed-circuit television procedure cannot be used consistent with the Sixth Amendment's Confrontation Clause unless the child witness has been questioned preliminarily in the defendant's presence. In essence, Maryland's high court has interpreted *Coy* so as to render meaningless this Court's decision in *Kentucky v. Stincer*, 482 U.S. 730 (1987). In addition, the *Craig* court has ignored the rationale that underlies the majority holding in *Coy*.

In *Stincer*, the Court held that the exclusion of the accused from a hearing on the competency of child witnesses to testify did not violate the defendant's confrontation right. 482 U.S. at 744. Had the Court of Appeals of Maryland looked to *Stincer*, it would

have realized that there are no rational distinctions between a hearing to determine whether a child is competent to testify and a hearing to determine whether a child should be allowed to testify via one-way closed-circuit television. Like the competency hearing at issue in *Stincer*, the hearing regarding use of a one-way closed-circuit television procedure does not involve questioning about the substance of the witness's testimony, but involves a collateral issue. *See id.* at 740-41. Indeed, the issue is not even whether the child witness will testify, but merely under what procedure the child will testify. Additionally, the decision whether to allow the use of the closed-circuit television procedure is the responsibility of the trial judge, not the jury. *See id.* at 742. And, the decision does not deprive the defendant of the opportunity for effective cross-examination at trial. *See id.* at 744. Accordingly, under *Stincer* a defendant has no right to confront the child on the issue of whether a one-way closed-circuit television procedure should be allowed.

The *Craig* court's decision also fails to take into account that this case, unlike *Coy*, involved very young children between the ages of four and seven. As the dissent in *Coy* pointed out, the reliability of child abuse victims may well be enhanced by protective procedures. 108 S.Ct. at 2809 n.5. This same conclusion was reached by the expert witnesses in the instant case. Of course, the younger the child, the more likely it is that confrontation with the accused will inhibit, rather than foster, the truthfulness of the child's testimony. As the *Coy* majority itself recognized, the right to face-to-face confrontation is intended to ensure the integrity of the fact-finding process. *Id.* at 2802; *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

Here, by requiring face-to-face confrontation, the Court of Appeals has actually jeopardized the *Coy* Court's goal of ferreting out the truth. This requirement, which the court finds compelled by *Coy*, also defeats the purpose of Section 9-102 before it can ever be brought to bear. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (same conclusion reached where court closure procedure attacked on First Amendment grounds). Stated otherwise, the court has erroneously and illogically required that the child be exposed to the very psychological and physical trauma that the protective measure was intended to prevent.

II. The *Craig* Decision Conflicts with Other State Post-*Coy* Decisions.

At least four members of the *Coy* majority expressly left unanswered the question whether face-to-face confrontation admits of any exceptions. 108 S.Ct. at 2803. This unresolved issue raises other important questions such as: Is a state's interest in safeguarding the physical and psychological well-being of a child victim an important public policy that would be furthered by exceptions to face-to-face confrontation? Is there a distinction between an opaque screen and a one-way closed-circuit television procedure? Is the premise that face-to-face confrontation encourages truthfulness applicable when the witness is not a teenager but is a very young child? Is a face-to-face meeting between the accused and the child witness required as a condition precedent to the invocation of a protective device that precludes face-to-face confrontation at trial? Each of these questions is impli-

cated by the Court of Appeals' decision in this case, although it is the last question that would be directly at issue in this Court.[7]

Since *Coy* was decided, a number of state courts have faced the issue of whether a procedure intended to protect a child victim from trauma at trial violates an accused's right to face-to-face confrontation. Virtually all of these courts have decided that face-to-face confrontation is not absolute and that the compelling interest of protecting a child witness may override a defendant's right to meet his accuser face-to-face. *E.g.*, *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) (en banc); *People v. Thomas*, 770 P.2d 1325 (Colo. Ct. App. 1988) (cert. granted by Colo. Sup. Ct. on March 13, 1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, *cert. denied*, 109 S.Ct. 2103 (1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989); *Brady v. State*, 540 N.E.2d 59 (Ind. Ct. App. 1989); *In the Interest of J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989); *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989) (en banc); *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35 (1989); *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.

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[7] Other open questions after *Coy* include: Is a two-way closed-circuit television procedure tantamount to face-to-face confrontation? Are hearsay exceptions pertaining to out-of-court statements of child victims to be judged hereafter under *Coy* or under the analysis set out in *Ohio v. Roberts*, 448 U.S. 56 (1980)? Arguably even one of these questions is implicated by the *Craig* decision. The Maryland Court of Appeals suggested that before permitting testimony by one-way closed-circuit television, the trial judge should explore protective measures that are less obstructive of the confrontation right, giving as an example two-way closed-circuit television. (16a-17a).

1988), *cert. denied*, 109 S.Ct. 1572 (1989); *State v. Taylor*, 562 A.2d 445 (R.I. 1989); *State v. Thomas*, 150 Wis.2d 374, 442 N.W.2d 10 (1989).[8]

Regarding *Coy*'s requirement of particularized findings before a protective procedure can be invoked, the *Craig* court and the Supreme Court of Rhode Island in *State v. Taylor*, *supra*, have said that ameliorative measures cannot be invoked until the child has demonstrated, in the defendant's presence, an inability to reasonably communicate. Other courts have, however, upheld the use of a protective procedural device where the particularized findings were not based upon a preliminary hearing in which the defendant came face-to-face with the child witness. *State v. Bonello*, *supra*; *Glendening v. State*, *supra*; *Brady v. State*, *supra*; *In the Interest of J.D.S.*, *supra*; *State v. Tafoya*, *supra*. *See also People v. Thomas*, *supra* (although case remanded for further proceedings on issue of particularized findings, guidance provided by court clearly suggests that findings need not be based on face-to-face meeting).

As this Court recognized in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), "[c]hild abuse is one of the most difficult crimes to detect and prosecute." Unless and until this Court clarifies its *Coy* decision and resolves the conflict that exists among the state courts, child abuse will remain difficult to prosecute. And, given that other state courts have, in the past, looked

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[8] The Louisiana Supreme Court has found it unnecessary to address the issue whether the Confrontation Clause admits of exceptions, *State v. Murphy*, 542 So.2d 1373 (La. 1989), and the West Virginia Supreme Court seems to have answered these questions in the negative, *State v. Murray*, 375 S.E.2d 405 (W.Va. 1988).

to the Maryland appellate courts for guidance on the issue of when a statutory provision such as Section 9-102 can be constitutionally invoked, *e.g.*, *State v. Vincent*, *supra*; *People v. Thomas*, *supra*; *State v. Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989), the Court of Appeals' erroneous decision in this case has significance beyond Maryland, and may well herald a retreat from the advances that other states have made to ensure that child abusers are prosecuted for their crimes.

CONCLUSION

Fifty-five years ago, Justice Cardozo said: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). In *Craig v. State*, the Court of Appeals of Maryland has struck an untrue balance between a defendant's constitutional right to face-to-face confrontation and the compelling governmental interest of safeguarding the physical and psychological well-being of a child. By correcting the *Craig* court's error, this Court will right the balance, clarify its view regarding exceptions to face-to-face confrontation, and advance every state's efforts to prosecute child abusers.

For these reasons, Petitioner requests this Court to issue a writ of certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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September 22, 1989

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 110
September Term, 1988

SANDRA ANN CRAIG

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,

JJ.

Opinion by Adkins, J.

Filed: July 24, 1989

By Chapters 495 and 499, Laws of 1985, the Maryland General Assembly enacted § 9-102 of the Courts and Judicial Proceedings Article. Maryland Code (1984 Repl.Vol., 1988 Cum.Supp.). Designed to facilitate testimony by child witnesses in child abuse (particularly sexual abuse) cases, the statute authorizes a judge to direct that a child's tes-

timony be received via one-way closed-circuit television.[1] When the procedure is invoked, judge, jury, and defendant remain in the courtroom. The child witness and counsel resort to another room, where the witness is questioned. A video monitor displays this process to those in the courtroom, but the witness cannot see the defendant. The procedure cannot be used, however, unless the judge first "determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Section 9-102(a)(1)(ii).

In *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987), § 9-102 was challenged as being in violation of the rights of confrontation granted by the sixth amendment to the United States Constitution and by Article 21 of the Maryland Declaration of Rights.[2] We upheld the facial constitutionality of the statute. We reasoned that the constitutional right of confrontation "ordinarily includes . . . the right of the accused to be seen by his accuser when the accuser is testifying against the accused." 310 Md. at 512-513, 530 A.2d at 286. Nevertheless, we concluded, that

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[1] For a general discussion of the problems of child abuse and efforts to cope with difficulties of testimony by its victims, *see Wildermuth v. State*, 310 Md. 496, 516-519, 530 A.2d 275, 285-286 (1987); *see also Coy v. Iowa*, ___ U.S. ___, ___, 108 S. Ct. 2798, 2803-2804, 101 L.Ed.2d 857, 868 (1988) (O'Connor, J., concurring); Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 Hastings L.J. 437, 439 n. 18 (1989) (as of January 1989, 41 states have sought to protect child witnesses through a variety of statutory measures).

[2] The sixth amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Article 21 of the Maryland Declaration of Rights provides, in pertinent part:

> That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him. . . .

right is not absolute. Under appropriate circumstances, including the existence of a compelling State interest and a particularized determination of the child witnesses' functional unavailability because of inability to testify due to severe emotional trauma, the statutory procedure passes constitutional muster. *Id.* at 518-520, 530 A.2d at 286-287.

We now face a new attack on § 9-102, once again based on the federal and State confrontation clauses. The primary argument presently before us is that under the Supreme Court's recent decision in *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), nothing less than a physical, face-to-face courtroom encounter between witness and accuser can ever satisfy the constitutional rights of confrontation. The Court of Special Appeals rejected this contention. *Craig v. State*, 76 Md.App. 250, 274-284, 544 A.2d 784, 796-800 (1988), and so do we. Nevertheless, we reverse because, as we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked.[3] Before explaining our reasoning, we summarize the pertinent facts.

I.

On 16 October 1986 a Howard County grand jury charged petitioner, Sandra Ann Craig (Craig), with child abuse, first and second degree sexual offense, perverted practice, assault, and battery. The alleged victim in each instance was Brooke Etze. Brooke had attended Craig's Country Pre-School, a kindergarten and pre-kindergarten center owned and operated by Craig, and site of the alleged offenses.

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[3] Because of the reversal, we need not address petitioner's contention that she was improperly denied certain exculpatory information to which she was entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). She now is in possession of this material and will be able to make appropriate use of it in the event of a new trial.

In March 1987, when the case was about to go to trial, the State sought to invoke § 9-102. The section's protection was desired not only with respect to Brooke (then seven years old), but also as to a number of other children who had, according to the State, been abused by Craig, and some of whom did eventually testify in the case involving Brooke.

The Circuit Court for Howard County heard only expert testimony as to whether § 9-102(a)(1)(ii)'s threshold had been crossed. The judge did not question or interview any of the child witnesses, nor were any of them called to the witness stand in Craig's presence, in an attempt to produce testimony in that fashion. *Compare Wildermuth*, 310 Md. at 524 n.13, 530 A.2d at 289 n. 13 (child's taking the witness stand revealed inability to testify). Without the benefit of our *Wildermuth* or the Supreme Court's *Coy*, neither of which had then been decided, the judge ruled:

> There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will [result] in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and it's appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102. . . .

Despite Craig's confrontation-based objections, Brooke and three other children testified via one-way closed-circuit television. The young witnesses, of course, could not see Craig while so testifying.[4] She was convicted on all counts and appealed, on numerous grounds, to the Court of Special Appeals. As we have noted, that court affirmed. We

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[4] For a more detailed description of the § 9-102 procedure, *see Wildermuth*, 310 Md. at 503-504, 530 A.2d at 278-279.

granted a writ of certiorari chiefly in order to reexamine *Wildermuth* in the light of the Supreme Court's pronouncements in *Coy*.

II.

In *Coy*, two 13-year-old girls were allegedly sexually assaulted. At trial, over Coy's objections, they were allowed to testify protected by a large screen placed between them and the accused. Because of certain lighting arrangements, Coy could "dimly perceive the witnesses, but the witnesses [were unable] to see him . . . at all." ___ U.S. at ___, 108 S.Ct. at 2799, 101 L.Ed.2d at 863. This was done pursuant to a statute subsequently codified at Iowa Code § 910A.14 (1987): "The court may require a party be confined . . . behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party." The Iowa statute did not contain any requirement that the trial court make a particularized finding of the child's inability to testify in the presence of the accused, and the Iowa trial judge made no such finding. In due course, Coy was convicted. The Supreme Court of Iowa affirmed, holding that since Coy's ability to cross-examine the witnesses was not impaired by the screen, there was no violation of the right to confrontation. *State v. Coy*, 397 N.W.2d 730 (Iowa 1986).

Six justices of the Supreme Court of the United States sharply disagreed with that view. Writing for the Court, Justice Scalia declared that the sixth amendment right of confrontation ordinarily demands a "face-to-face encounter" between accused and accuser. *Coy*, ___ U.S. at ___, 108 S.Ct. at 2802, 101 L.Ed.2d at 866. The Supreme Court majority found this result was required by basic fairness and to assure " 'the integrity of the fact-finding process. . . .' " *Id.* at ___, 108 S.Ct. at 2802, 101 L.Ed.2d at 866 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736, 107

S.Ct. 2658, 2662, 96 L.Ed.2d 631, 641 (1987). As Justice Scalia explained:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id. at ___, 108 S.Ct. at 2802, 101 L.Ed.2d at 866.

The same six justices[5] also agreed that if there are any exceptions to the right of confrontation, as above defined, something more than "a legislatively imposed presumption of trauma" is required to trigger them. *Id.* at ___, 108 S.Ct. at 2803, 101 L.Ed.2d at 867. "Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.* The question of "whether any exceptions exist" was left for "another day." *Id.*

The question reserved by the Supreme Court is before us now. It is a question that was not squarely presented in *Wildermuth*, for in that case, the parties agreed that there could be exceptions to face-to-face confrontation. 310 Md. at 514, 530 A.2d at 284. The issue there was what circumstances would justify use of the exception embodied in § 9-102.

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[5] Justices Brennan, White, Marshall, Stevens, and O'Connor joined Justice Scalia's opinion.

Craig grounds her argument on Justice Scalia's view of the truth-ascertaining effect of physical confrontation in the courtroom—his conviction that while "face-to-face presence may . . . upset the truthful rape victim or abused child; . . . it may [by the same token] confound and undo the false accuser or reveal the child coached by a malevolent adult" and his insistence that "[i]t is a truism that constitutional protections have costs." *Id.* at ___, 108 S.Ct. at 2802, 101 L.Ed.2d at 866. Writing on behalf of the majority, Justice Scalia acknowledged that the Supreme Court had previously "indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests," *id.*, but he went on to assert:

> The rights referred to in those cases . . . were not the right narrowly and explicitly set forth in the Confrontation Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine, see *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297, [309] (1973); the right to exclude out-of-court statements, see *Ohio v. Roberts*, 448 U.S. [56,] 63-65, 100 S.Ct. 2531, 2537-2538, 65 L.Ed.2d 597 [, 605-607 (1980)]; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself, *Kentucky v. Stincer*, 482 U.S. [730], 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: "a right to *meet face to face* all those who appear and give evidence *at trial*." *California v. Green*, 399 U.S. [149,] 175, 90 S.Ct. [1930,] 1943-

> 1944 [, 26 L.Ed.2d 489, 506-507 (1970)] (Harlan, J., concurring) (emphasis added).

Id. at ___, 108 S.Ct. at 2802-2803, 101 L.Ed.2d at 866-867.

This language forcefully suggests that there is no exception to the right of a criminal defendant to confront, face-to-face, a witness who testifies against him. Yet the Supreme Court majority did not so hold. As we have noted, the Court struck down the Iowa statute because "it could not be sustained by any conceivable exception." *Id.* at ___, 108 S.Ct. at 2803, 101 L.Ed.2d at 867. Expressly declining to decide "whether any exceptions exist," Justice Scalia did observe that "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy." *Id.*

Two members of the majority for which Justice Scalia wrote concurred in order to explain their understanding of the majority opinion. Justice O'Connor, joined by Justice White, agreed with the Court "that the Confrontation Clause was violated in this case." ___ U.S. at ___, 108 S.Ct. at 2803, 101 L.Ed.2d at 868 (O'Connor, J., concurring). She found "nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant." *Id.* at ___, 108 S.Ct. at 2804, 101 L.Ed.2d at 868-869. But she wrote separately "to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." *Id.* at ___, 108 S.Ct. at 2803, 101 L.Ed.2d at 868. She wished to make clear "that nothing in today's decision necessarily dooms . . . efforts by state legislatures to protect child witnesses," and among the "efforts" to which she referred were statutes of a number of states authorizing, under certain circumstances,

the use of one-way closed-circuit television. *Id.* at ___, 108 S.Ct. at 2804, 101 L.Ed.2d at 868.

Indeed, Justice O'Connor "reject[ed] any suggestion . . . in the Court's opinion" that the right to confrontation was absolute. *Id.* at ___, 108 S.Ct. at 2804, 101 L.Ed.2d at 869. She observed that

> the Court has time and again stated that the [Confrontation] Clause 'reflects a *preference* for face-to-face confrontation at trial,' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants. *Ohio v. Roberts*, 448 U.S. 56, 63-64, 100 S.Ct. 2531, 2537-2538, 65 L.Ed.2d 597 [, 605-607] (1980) (emphasis added). See also *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 [, 309] (1973). . . . That a particular procedure impacts the 'irreducible literal meaning of the clause,' [___ U.S. at ___, 108 S.Ct. at 2803, 101 L.Ed.2d at 867] does not alter this conclusion.

Justice O'Connor went on to note that

> our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

Id. For this reason, she would

> permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. See ante, [___ U.S. at ___, 108 S.Ct. at 2802-2803, 101 L.Ed.2d at 867] (citing *Ohio v. Roberts*, *supra*; *Chambers v. Mississippi*, *supra*). The protection of child witnesses is, in my view and in the view of a sub-

stantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, e.g., Cal. Penal Code Ann. § 1347(d)(1) (West Supp. 1988); Fla. Stat. § 92.54(4) (1987); Mass. Gen. Laws § 278:16D(b)(1) (1986); N.J. Stat. Ann. § 2A:84A-32.4(b) (Supp. 1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach, I join it.[6]

___ U.S. at ___, 108 S.Ct. at 2805, 101 L.Ed.2d at 869-870.

As we interpret the concurrence, Justice O'Connor and Justice White joined the majority on the understanding that nothing in Justice Scalia's opinion negated the existence of exceptions to the absolute right of confrontation. That view of the majority opinion seems to have been shared by Justice Scalia as well. Although he took pains to attack the dissent,[7] *see, e.g.*, ___ U.S. at ___ n. 2, 108

[6] Three of the four state statutes cited by Justice O'Connor, those of Florida, Massachusetts, and New Jersey, permit testimony out of the physical or televised presence of the defendant, after a case-specific finding of necessity. The California statute provides for two-way television.

[7] Justice Blackmun, joined by the Chief Justice, dissented. They did not see face-to-face confrontation as a right invariably guaranteed by the sixth amendment. They believed the Iowa statute embodied an important public policy—protecting the child witness from psychological trauma and thus bolstering the truth-finding function of the trial—so that the sixth amendment preference for face-to-face confrontation was

S.Ct. at 2801 n. 2, 101 L.Ed.2d at 865 n. 2, he did not take issue with any part of Justice O'Connor's concurrence. *See Craig*, 76 Md.App. at 279-280, 544 A.2d at 798.

Reading the majority opinion in light of the gloss placed upon it by the concurrence, the Supreme Court of Wisconsin concluded that *Coy* does not preclude, under appropriate circumstances, the use of trial procedures that supplant physical confrontation at trial. *State v. Thomas*, ___ Wis. 2d ___, ___, 442 N.W.2d 10, ___ (Wis. 1989). So did the Court of Special Appeals. *Craig*, 76 Md.App. at 280, 544 A.2d at 798-799. Most courts that have considered the matter agree. *See, e.g., State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) (relying in part on *Wildermuth*); *State v. Thomas*, 770 P.2d 1324 (Colo.Ct.App. 1988), *cert. granted* (1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, *cert. denied*, ___ U.S. ___, 109 S.Ct. 2103, 104 L.Ed.2d 664 (1989); *Glendening v. State*, 536 So.2d 212 (Fla.1988); *Brady v. State*, 540 N.E.2d 59 (Ind.Ct.App.1989); *In the Interest of J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State v. Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989); *State v. Crandall*, 231 N.J.Super. 124, 555 A.2d 35 (1989); *State in Interest of B.F.*, 230 N.J.Super. 153, 553 A.2d 40 (1989); *State v. Davis*, 229 N.J.Super. 66, 550 A.2d 1241 (1988); *People v. Rivera*, 141 Misc.2d 1031, 535 N.Y.S.2d 909 (N.Y.Sup. Ct.1988); *Ohio v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409 (1988). *But see State v. Murray*, 375 S.E.2d 405 (W. Va.1988).[8]

overcome. They saw no need for case-by-case inquiry. ___ U.S. at ___-___, 108 S.Ct. at 2805-2810, 101 L.Ed.2d at 870-876 (Blackmun, J., dissenting). Justice Kennedy took no part in the consideration or decision in *Coy*.

[8] The Supreme Court of Louisiana has also dealt with the problem of the constitutionality of a child witness protection statute in the wake of *Coy*. *Louisiana v. Murphy*, 542 So.2d 1373 (La. 1989). The court struck out the provision in the statute which denied the defendant's right of confrontation on the basis that the statute, inconsistent with the holding in *Coy*, did not provide for a case specific finding of ne-

In view of our reading of *Coy*, and in light of the virtual unanimity of other courts in sustaining the constitutionality of a variety of protective devices not dissimilar to that provided by § 9-102, we conclude that there are, indeed, valid exceptions to face-to-face confrontation. This said, however, we believe *Coy* requires us to limit the use of the exception embodied in § 9-102 to circumstances even narrower than those we delineated in *Wildermuth*.

III.

Both the right to confrontation and the protection of the child witness relate to the truth-seeking function of a trial. For reasons discussed in both *Coy*, ___ U.S. at ___, 108 S.Ct. at 2802, 101 L.Ed.2d at 866, and *Wildermuth*, 310 Md. at 509-513, 530 A.2d at 281-283, confrontation may induce truthful testimony. And yet a child-witness who is too terrified of the defendant to testify at all will produce no testimony; thus some truth may be concealed.

In *Wildermuth*, we concluded that the balance could be struck in favor of the child witness when the *Roberts*, *supra*, standard of witness unavailability and evidence reliability is met. 310 Md. at 514-516, 530 A.2d at 284-285. From *Roberts*, we learned "that if there is sufficient necessity for not permitting the accused to confront his accuser directly (unavailability), and if the situation is such that there is some reasonable substitute for the truth-seeking confrontation requirement of physical presence (reliability), then the right of confrontation may still be satisfied." *Wildermuth*, 310 Md. at 515, 530 A.2d at 284 [footnote omitted]. The "reliability" prong of the *Roberts*

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cessity. 542 So.2d at 1376. The court expressly stated, however, that it was not addressing the question of whether a statute that did provide for specific findings could be constitutional. *Id.* at 1376.

test, we concluded, is satisfied in large measure by § 9-102 because it "provides for most of the aspects of confrontation that enhance the reliability of testimony: cross-examination, testimony under oath, ability of judge, jury, and accused to view the witness during the testimony." *Id.* at 515, 530 A.2d at 285.

Our focus in *Wildermuth*, as it is in this case, was on "[t]he only reliability function not substantially provided by one-way closed-circuit television"—the truth-enhancing trial procedure of face-to-face confrontation. *Id.* at 516, 530 A.2d at 285. Reasoning that a properly-supported finding under § 9-102(a)(1)(ii) "is tantamount to a finding of unavailability in the *Roberts* sense and meets the necessity prong of the *Roberts* test," *id.*, 310 Md. at 519, 530 A.2d at 286, we held that "[t]he degree of confrontation allowed by § 9-102 . . . satisfies the constitutional requirements if there is compliance with subsection (a)(1)(ii) as a condition precedent to application of the statute." *Id.* at 520, 530 A.2d at 287. We now reexamine that holding in light of *Coy* and the contentions raised by Craig.

By the language of the statute, § 9-102 may be applied to deny the defendant the right of face-to-face confrontation if it is shown "*that testimony by the child victim in the courtroom* will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Section 9-102(a)(1)(ii) [emphasis added]. We bear in mind *Coy's* strong emphasis on the constitutional right of a criminal defendant to physically confront an accuser who appears and gives testimony at trial. We reiterate that this right can be abridged only where there is "a case-specific finding of necessity." ___ U.S. at ___, 108 S.Ct. at 2805, 101 L.Ed.2d at 869 (O'Connor, J., concurring); *Wildermuth*, 310 Md. at 518-519, 530 A.2d at 286. In light of these factors, we believe a statutory inquiry which looks generally to a child's inability to testify in open court to be too broad to satisfy the necessity requirement. The question of whether a child is unavailable

to testify in the *Roberts* sense should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused.[9] The need for this degree of particularized inquiry was perceived by the Court of Special Appeals in this case. It held, in part, that "*where a face-to-face meeting would in fact so traumatize a child witness as to prevent him or her from reasonably communicating*, the State may provide for that testimony to be taken in a setting that, as nearly as practicable, preserves all other aspects embodied in the right of confrontation. . . ." *Craig, supra*, 76 Md.App. at 280, 544 A.2d at 799 [emphasis added].

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[9] It is conceivable that a child witness may be "unavailable" in the *Roberts* sense because of some problem other than the presence of the defendant. For example, the child may be intimidated by the courtroom setting, or by the presence of large numbers of strange adults—judges, lawyers, jurors, other courtroom personnel, and spectators. *See* D. Whitcomb, E. Shapiro, & L. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (1985). This sort of problem is not a confrontation problem, because it is not the defendant's presence that is causing the difficulty. In this kind of situation, if the impediment to testimony is severe enough, other remedial measures may be available, although other constitutional rights (the criminal defendant's right to a public trial; the right of the public and the press to attend a criminal trial) may be implicated. *See Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31, 38 (1984) (criminal defendant's sixth amendment right to public trial not absolute); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, 100 S.Ct. 2814, 2830, 65 L.Ed.2d 973, 1000 (1980) (public's and press's right of access to trial not absolute); *Buzbee v. Journal Newspapers*, 297 Md. 68, 80, 465 A.2d 426, 433 (1983) (same); *see also News American Div. Hearst Corp. v. State*, 294 Md. 30, 36-38, 447 A.2d 1264, 1267-1268 (1982) (discussing *Richmond Newspapers*). Closure of the courtroom to protect victims of sex crimes from trauma may be justified. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 n. 2, 106 S.Ct. 2735, 2741 n. 2, 92 L.Ed.2d 1, 11 n. 2 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-610, 102 S.Ct. 2613, 2620-2622, 73 L.Ed.2d 248, 257-259 (1982); *see also, United States v. Sherlock*, 865 F.2d 1069, 1076-1077 (9th Cir. 1989) (exclusion of defendant's family during testimony of victim justified under particular circumstances of case).

Other courts have reached similar conclusions. In the recent case of *State v. Crandall, supra*, a New Jersey intermediate appellate court determined a trial court's finding that a particular child witness would suffer " 'substantial emotional upset' " if required " 'to testify in open court' " to be insufficient to support the use of closed-circuit television to receive the child's testimony. 231 N.J. Super. at 131-32, 555 A.2d at 39. Noting the important distinction between testifying in open court and testifying in the presence of the defendant, it pointed out that the trial judge had made no specific findings regarding the distress the child would experience if required to testify in the presence of the defendant. *Id.* "[I]t is a finding of that stress," the court concluded, "which is absolutely critical to support an exception to the generally required right of face-to-face confrontation." *Id.* That the determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony is also apparent in *Vincent, supra*, 159 Ariz. at 432, 768 P.2d at 164; *State v. Jarzbek*, 210 Conn. 396, 397, 554 A.2d 1094, 1095 (1989), and *State v. Bonello, supra*, 210 Conn. at 58, 59, 554 A.2d at 281. *See also State v. Davidson*, 764 S.W.2d 731, 734 (Mo. App. 1989) (insufficient evidence that trauma was product of defendant's presence to warrant defendant's exclusion from videotaped deposition).

When we read § 9-102(a)(1)(ii), we approach construction of the phrase "in the courtroom" with the understanding that the " 'meaning of the plainest language' is controlled by the context in which it appears." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 514, 525 A.2d 628, 632 (quoting *Guardian Life Ins. Co. of America v. Ins. Comm'r*, 293 Md. 629, 642, 446 A.2d 1140, 1147 (1982)). The most significant constitutional aspect of § 9-102 is the authority therein to deny the accused the right of face-to-face confrontation. It is in this context that the § 9-102(a)(1)(ii) inquiry operates, and it is this context which must be

viewed as controlling. We bear in mind, too, that as a general rule a statute will be construed to avoid constitutional conflict whenever feasible. *City of College Park v. Cotter*, 309 Md. 573, 589, 525 A.2d 1059, 1067 (1987); *In re Criminal Investigation No. 1-162*, 307 Md. 674, 685, 516 A.2d 976, 982 (1986). We also presume that the General Assumably intended its enactments to be in harmony rather than at odds with both the Maryland and United States Constitutions. *Marshall v. Dir. of Fin., Pr. Geo's Co.*, 294 Md. 435, 440, 450 A.2d 1300, 1303 (1982).

We conclude that under § 9-102(a)(1)(ii), the operative "severe emotional distress" which renders a child victim unable to "reasonably communicate" must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase "in the courtroom" as meaning, for sixth amendment and Article 21 confrontation purposes, "in the courtroom in the presence of the defendant." Unless prevention of "eyeball-to-eyeball" confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.

As a consequence, in the face of a confrontation challenge, § 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence, and is found by the judge who presided at this procedure to be unable to "reasonably communicate" because of "serious emotional distress" produced by the presence of the defendant. *See Wildermuth*, 310 Md. at 523-524, 530 A.2d at 289 (personal observation by judge should be the rule rather than exception). The judge's own observations in this regard may, of course, be bolstered by expert testimony bearing on the particular child's inability to testify in the presence of the defendant.

If that finding is made, appropriate protective measures must then be tailored to limit the confrontation right as

little as feasible. Section 9-102, read in the light of *Coy*, cannot be the exclusive means of witness protection. It is, rather the ultimate—the farthest a court can go in that direction. Thus, for example, if a child witness will not suffer "severe emotional distress" when testifying via two-way television in a room separate from the courtroom, so that the accused is visible to the witness as well as vice versa, that procedure should be followed. This type of procedure "may raise no substantial Confrontation Clause problem since [it involves] testimony in the presence of the defendant." *Coy*, ___ U.S. at ___, 108 S.Ct. at 2804, 101 L.Ed.2d at 868 (O'Connor, J., concurring). *See also Ohio v. Eastham*, *supra*, 39 Ohio St.3d at 310 n. 5, 530 N.E.2d at 412 n. 5 (noting that testimony by two-way closed-circuit television may be less obstructive of confrontation rights than a one-way procedure). The use of such a procedure is consistent with a trial judge's broad discretion in conducting a criminal trial. *Yorke v. State*, 315 Md. 578, 585, 556 A.2d 230, 233 (1989); *Wiggins v. State*, 315 Md. 232, 239, 554 A.2d 356, 359 (1989); *Ricks v. State*, 312 Md. 11, 31, 537 A.2d 612, 622, *cert. denied*, ___ U.S. ___, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988). This wide latitude often extends to the admission of evidence, *Crawford v. State*, 285 Md. 431, 451, 404 A.2d 244, 254 (1979), and to the examination of witnesses, *Trimble v. State*, 300 Md. 387, 401, 478 A.2d 1143, 1150, *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1984). Nothing in § 9-102 precludes such a procedure.

If the court determines that neither two-way television nor any other device short of that authorized by § 9-102 will enable the witness to testify, *see* note 9, *supra*, it may then turn to that section. In short, before the procedures of § 9-102 may be used, the trial court faced with a confrontation objection must find that testimony by the child witness in the physical or televised presence of the defendant "will result in the child suffering serious emo-

tional distress such that the child cannot reasonably communicate."

IV.

The steps taken in the trial court, in this case, to invoke the protection of § 9-102 did not comply with the requirements we have set forth in Part III of this opinion.[10] Four children testified via one-way closed-circuit television. Their ages ranged from four to seven. Two were girls and two were boys. When the trial judge made his § 9-102 determination, the finding that authorized the use of closed-circuit television, he had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling.[11] He did not explore any alternatives to the use of one-way closed-circuit television.

In the absence of judicial observation of the witnesses and careful exploration of alternatives to full confrontation, beginning with those least restrictive of the right, the testimony before the court was insufficient to support the use of § 9-102. The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said what "would cause him the most anxiety would be to testify in front of Mrs. Craig. . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she "would probably stop talking and she would withdraw and curl

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[10] In fairness to the trial judge, we again note that when he acted, he did not have the benefit of our *Wildermuth*, let alone of the Supreme Court's *Coy*.

[11] The judge did examine the children in the course of determining their competency as witnesses. But the record discloses that during the competency questioning, he made no attempt to probe areas pertinent to a § 9-102 finding.

up." With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions" while the other would "become extremely timid and unwilling to talk."

We need not debate whether under some circumstances this sort of evidence might help to support a finding that a child, if he or she testified in the defendant's presence, would suffer "serious emotional distress such that the child cannot reasonably communicate." We do point out that in *Wildermuth*, we said that "testimony about the likely impact on the particular child must be specific and must show more than mere nervousness or excitement or some reluctance to testify." 310 Md. at 524, 530 A.2d at 289. Even more critical, "there must be 'a particularized examination of all the circumstances concerning the impact of public testimony *in the presence of the defendant* upon the emotional health of the child.'" *Id.* at 525, 530 A.2d at 289 (quoting *People v. Algarin*, 129 Misc.2d 1016, 1024, 498 N.Y.S.2d 977, 983 (N.Y.Sup.Ct.1986) [emphasis supplied].

The difficulty here is that the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses. For example, as to one witness, the expert thought the child "coming into the courtroom where she would be faced with the alleged perpetrator *and a courtroom of strangers* would be unable to talk about what happened to her." [Emphasis supplied]. As to another: "he would have great difficulty in *talking in front of people*, particularly in front of Mrs. Craig. . . ." [Emphasis supplied]. With respect to the third child, this dialogue occurred:

> Q. What do you think the reaction of Jessie . . . would be if brought *into the courtroom* to testify?

> A. I [think] that she would probably—Jessie would probably look around and become extremely timid and unwilling to talk. [Emphasis supplied].

When the constitutional right of confrontation is at issue, we repeat, the necessity that may be invoked to diminish that right, through procedures such as those permitted by § 9-102, must be related to testimony in the defendant's presence. It is not enough, for this purpose, that trauma or inability to testify be produced by testifying in the courtroom or in front of people. There may be other ways of dealing with that sort of problem, *see* note 9, *supra*, but limitation of the right of confrontation is not one of them.

Whether the trial judge might have narrowed the generality of this testimony, had he questioned the potential witnesses, we cannot tell. He did not question them; he did not have before him our declaration that "personal observation [and inquiry] by the judge . . . should be the rule rather than the exception." *Wildermuth*, 310 Md. at 523-524, 530 A.2d at 289.

Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that "the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate." He failed to find—indeed, on the evidence before him, could not have found—that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-

102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AND REMAND TO THE LATTER COURT FOR A NEW TRIAL IN ACCORDANCE WITH THIS OPINION. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

APPENDIX B

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1547
September Term, 1987

SANDRA ANN CRAIG

v.

STATE OF MARYLAND

Wilner
Karwacki
Wenner,

JJ.

Opinion by Wilner, J.

Filed: August 3, 1988

Sandra Ann Craig owned and operated a kindergarten and pre-kindergarten school in Howard County known as Craig's Country Pre-School. Brooke Etze attended the school during the period August, 1984, through June 7, 1986, when she was between four and six years of age. Brooke's parents were entirely satisfied with the school and with Ms. Craig while Brooke was enrolled there.

On June 21, 1986, Mr. and Mrs. Etze read a newspaper article recounting complaints of children having been

abused at Ms. Craig's school. A week or two later, they received a letter inviting them to a meeting hosted by the county's sexual assault center and social services and health departments. They attended the meeting, and, as a result of what they learned, they contacted the sexual assault center and arranged to have Brooke evaluated by a therapist, Mary Burke. In her fourth or fifth session with Ms. Burke, Brooke said a number of things that led Ms. Burke to suspect that she had been the victim of abuse. Ms. Burke contacted the police and social services departments, who then joined in an investigation of Brooke's allegations.

In ensuing conversations with her parents and in further sessions with Ms. Burke, Brooke revealed a number of incidents of physical, sexual, and psychological abuse committed by Ms. Craig directly, by two of Ms. Craig's children—Jamal and Mika—and by other children at the school. The direct abuse by Ms. Craig included kicking Brooke on the legs and in her "private parts," inserting a stick in her vagina, and threatening her with the loss of her parents' love. A medical examination by Dr. Charles Shubin revealed a scarred hymen, with an opening nearly four times normal—"abnormal findings . . . which represent very clear healed injury to this child."

As a result of these disclosures and investigations, a six-count indictment was returned in the Circuit Court for Howard County against Ms. Craig. It charged her with first degree sexual offense (Count 1), second degree sexual offense (Count 2), child abuse (Count 3), unnatural and perverted sexual practice (Count 4), common law assault (Count 5), and common law battery (Count 6). Each of these offenses, the indictment alleged, was committed "during the period of September 1984 to June 1986, at Howard County. . . . "[1]

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[1] The investigation into Ms. Craig and the activities at her school

Prior to trial, both sides filed a number of motions. Among those filed on behalf of Ms. Craig were a demand for particulars, a motion "for disclosure of impeaching information," a motion for discovery and production of documents, and a motion *in limine* to preclude testimony by Ms. Burke as to statements made to her by Brooke. The demand for particulars, averring that the indictment lacked "specificity and particularity," sought, among other things, the "specific acts the State alleges the defendant did to constitute the crimes charged in each and every charge" and "the date and time of the act or acts that the State alleges constituted a crime in each and every crime charged against the Defendant." In the discovery motion, Ms. Craig asked for "any material or information which tends to negate the guilt of the defendant as to the offense(s) charged," copies of "all written memoranda which any of the State's witnesses will take with them to the witness stand or refer to while testifying during the State's case in chief," and "the substance of any oral report and conclusion made in connection with the Defendant's case by each expert consulted by the State, including the results of any physical or mental examination. . . ."

The State, for its part, moved to allow Brooke and other young children to testify through closed circuit television, pursuant to Md.Code Ann.Cts. & Jud.Proc. art., § 9-102, and to allow certain "other crimes" evidence in order to establish "a pattern of conduct on the part of the Defendant."

In lieu of a formal response to the demand for particulars and the two discovery motions, the parties agreed to an open-file discovery, i.e., the State agreed to "provide

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extended beyond what allegedly occurred to Brooke Etse. Ultimately, 13 separate indictments were returned against Ms. Craig. Her son Jamal Craig was also charged in two other indictments. Trial in this case proceeded only upon the one indictment of Ms. Craig involving Brooke Etse.

all non work-product reports in its files" as well as "a complete witness list." The one exception to this approach concerned certain records of the county health department which the Attorney General, presumably as counsel to the health department, delivered to the court for *in camera* inspection. Upon such review, the court denied the request to produce those documents, which it characterized principally as "correspondence, much of it apparently unsolicited, from parents of children attending the . . . facility operated by the Defendant" that did not tend "to negate or mitigate the guilt or punishment of the Defendant as to the offense(s) charged." Counsel did not press the point further and accepted the open file discovery as a sufficient response to his various motions.

Ms. Craig's motion *in limine* was effectively denied, at least to the extent that Ms. Burke was permitted to testify and to relate both verbal and non-verbal communications from Brooke made during the evaluation and therapy sessions. The State's motions were granted. Other children allegedly abused by Ms. Craig were allowed to testify as to what had occurred to them, and both they and Brooke were permitted to testify through closed circuit television.

After 12 days of trial, the jury convicted Ms. Craig on all six counts. She then discharged her trial attorneys and employed new counsel, who filed amended motions for new trial.[2] Extended evidentiary hearings were held on those motions. On September 21, 1987, however, the court finally denied the motions and imposed sentence. This appeal followed in which seven issues, three of them multi-part, are raised. Ms. Craig complains that: (1) the State withheld exculpatory evidence that it had a duty to disclose; (2) the indictment was defective; (3) the court erred in allowing the children to testify on closed circuit television; (4) it

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[2] Trial counsel had already filed a motion and one amended motion for new trial on Ms. Craig's behalf. New counsel eventually filed two further amended motions for new trial.

erred in admitting an opinion from Ms. Burke that Brooke was the victim of child abuse; (5) it erred in allowing Ms. Burke and Mrs. Etze to testify as to Brooke's statements to them; (6) it wrongfully excluded certain testimony of Ms. Craig's expert witness; and (7) it erred in allowing the testimony of other children as to abuse suffered by them. Interlaced with some of these complaints is the further charge that her trial counsel was Constitutionally incompetent.

We find no merit in any of these complaints and shall therefore affirm.

I. WITHHELD EVIDENCE

(1) *Introduction*

As we observed, in lieu of a formal response to Ms. Craig's various motions, the State opted to provide an open file discovery. Pursuant to that agreement, it turned over to defense counsel the "main Investigative file" of the county police department, the written statements of 16 witnesses, a therapist's report and a medical report on another alleged child-victim, all or parts of police reports involving Brooke and other children, and a report and addendum prepared by Brooke's therapist, Mary Burke.

The focus of Ms. Craig's complaint is on the material known or available to the State that was *not* disclosed, principally the therapy notes of Ms. Burke recording (1) statements made by Brooke directly to Ms. Burke, to Brooke's parents, or, in one instance, allegedly to Dr. Shubin, (2) statements made by other child-witnesses to Ms. Burke during the course of their evaluation and therapy, and (3) Ms. Burke's impressions of Brooke's credibility. Ms. Craig urges that these documents and some others recording like information contain material that is exculpatory to her, that was available to the prosecutor, that the prosecutor had a duty to disclose, and that could have influenced the verdicts in the case.

(2) *General Duty Of Disclosure*

The duty of a prosecutor to disclose exculpatory information is a matter of both Federal and State law. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), the Supreme Court held flatly that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." That holding was refined somewhat in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), where the Court attempted to define the circumstances under which non-disclosure would warrant upsetting an adverse verdict and ordering a new trial. In that regard, the Court drew a distinction between evidence or information that was "available to the prosecutor and not submitted to the defense" and that which "had simply been discovered from a neutral source after trial." *Id.*, at 111, 96 S.Ct. at 2401.

As a prosecutor is under no "constitutional duty routinely to deliver his entire file to defense counsel," the Court rejected Agurs's plea to "treat every nondisclosure as though it were error." *Id.* Rather, it held, at 112-13, 96 S.Ct. at 2401-02:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new

> trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

(Footnotes omitted.)

Md.Rule 4-263 imposes and extends the requirement of disclosure as a matter of State law. Section (a) of the Rule requires the disclosure, even without a request, of "[a]ny material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged." Section (b) requires the further disclosure, upon request, of additional classes of information, including written reports and the substance of oral reports by each expert consulted by the State "including the results of any physical or mental examination. . . ."

Under these requirements—Federal and State—where the question of non-disclosure arises after the trial is over and the issue is the validity of the verdict, at least three considerations are usually present: (1) was the information that was allegedly withheld really exculpatory, i.e., did it tend to negate or mitigate the guilt or punishment of the defendant as to the offense(s) charged; (2) was the information reasonably available to the prosecutor so that it could have been disclosed; and (3) was it material in the sense that, when "evaluated in the context of the entire record," it "creates a reasonable doubt that did not otherwise exist." *United States v. Agurs, supra*, 427 U.S. at 112, 96 S.Ct. at 2402; see also *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706, *reh. denied* 409 U.S. 897, 93 S.Ct. 87, 34 L.Ed.2d 155 (1972); *Stevenson v. State*, 299 Md. 297, 473 A.2d 450 (1984); *Yeagy v. State*, 63 Md.App. 1, 491 A.2d 1199 (1985). Each of these considerations is

in contention here. We shall begin with the second—availability.

(3) *Availability Of The Undisclosed Information*

As we observed, the *Agurs* Court drew a distinction between information that was "available to the prosecutor" prior to or during trial and evidence "discovered from a neutral source after trial." 427 U.S. at 111, 96 S.Ct. at 2401. It is in the former situation that due process is most directly and significantly implicated. Md.Rule 4-263 fleshes this out a bit. Section (g) of that Rule applies the obligation of disclosure to

> "material and information in the possession or control of the State's Attorney and staff members and *any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.*"

(Emphasis added.)

Health and social service agencies do not ordinarily report their findings or suspicions to the State's Attorney; indeed, in most instances they are precluded from doing so by confidentiality statutes. See, for example, Md.Code Ann.Cts. & Jud.Proc. art., § 9-109. Normally, then, material in the files of those agencies, especially material protected by privilege, would not be subject to disclosure under either due process requirements or under Rule 4-263(a)(1).[3]

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[3] We deal here, of course, with section (a)(1) of Rule 4-263, concerning information tending to negate or mitigate guilt or punishment, and not with section (a)(2) concerning searches, seizures, statements made by the defendant to a "State agent" that the State intends to use at trial, and pre-trial identifications of the defendant by a "witness for the State."

A special situation exists with respect to child abuse cases, however. Since 1966, every health practitioner, every education, mental health, and social worker, and every law enforcement officer has been under a statutory obligation to make a written report whenever that person (1) has examined or treated a child, and (2) from that examination or treatment, has reason to believe that the child has sustained physical injury as a result of abuse. See 1966 Md.Laws, ch. 221. During the period relevant to this case, these reporting requirements and the follow-up actions required to be taken by the various health, social services, and law enforcement agencies were set forth in Md.Code Ann.Fam.Law art., §§ 5-901—5-912.[4] Section 5-903 required the report to be made to the local department of social services but also required that a copy of that report be sent to the State's Attorney. That duty pertained "[n]otwithstanding any law on privileged communications." In addition to certain specified information, the report was to contain "any other information that would help to determine: (i) the cause of the suspected abuse; and (ii) the identity of any individual responsible for the abuse." § 5-903(c)(5).

Section 5-905 required that, promptly after receiving a report of suspected abuse, the department of social services or the appropriate law enforcement agency, or both, must make a "thorough investigation." That investigation was to include, "(1) a determination of the nature, extent, and cause of the abuse, if any; and (2) if the suspected abuse is verified . . . a determination of the identity of the

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[4] Effective July 1, 1988, those provisions were amended and recodified. 1987 Md.Laws, ch. 635. They now appear as Fam.Law art., §§ 5-701—5-715. The substance of the requirements noted in this Opinion has not changed. See, however, 1988 Md.Laws, ch. 769, providing a limited exemption from the reporting requirement where the disclosure would violate the attorney-client privilege provided for in Md.Code Ann.Cts. & Jud.Proc. art., § 9-108 or the clergyman-parishioner privilege provided for in § 9-111 of that article.

person or persons responsible for the abuse. . . ." § 5-905(b). Section 5-905(e) required, as of January, 1985, that the "agencies responsible for investigating child *sexual* abuse," including the State's Attorney, "implement a joint investigation procedure for conducting joint investigations of child sexual abuse." (Emphasis added.) Finally, § 5-905(g) required that "[w]ithin 5 business days after completion of the investigation, the local department [of social services], and the appropriate law enforcement agency, if that agency participated in the investigation, *shall make a complete written report of its findings to the local State's Attorney.*" (Emphasis added.)

Pursuant to the directive in § 5-905(e), the Howard County State's Attorney entered into an agreement with the county police and social services departments providing for joint investigations by those agencies and the sharing of information among them. That agreement also provided for a "complete written report" of the investigation to be submitted to the State's Attorney.

This requirement of information sharing was made known to Brooke's parents. Prior to the first session with Ms. Burke, Mrs. Etze signed a form acknowledging, among other things, that "the Howard County Sexual Assault Center is mandated by law to report *suspected* sexual abuse of children to the Police or to Protective Services of the appropriate community," that "it is the policy of the Center to cooperate fully with the Police and Protective Services during the active investigation of the suspected sexual abuse or assault of a child under the age of 18," and that "Howard County Sexual Assault Center records and information are subject to subpoenas which mandate release and disclosure." (Emphasis in original.)

In the case at hand, there was indeed close cooperation between the State's Attorney's Office and the other agencies, including the sexual assault center. Assistant State's Attorney Mary C. O'Donnell attended approximately 12 of

the therapy sessions conducted by Ms. Burke with Brooke, as well as several sessions conducted with the other child witnesses; she also had a dozen or so telephone conversations with Ms. Burke regarding Brooke. A written report summarizing five sessions with Brooke, from July 28 through September 2, 1986, was sent by Ms. Burke to the State's Attorney's Office, supplemented by a further report in January, 1987, summarizing three additional sessions.

On these facts—the statute, the agreement, and the actual contact and reporting—it is clear beyond cavil that the requirements of Rule 4-263 would extend to relevant material in the hands of the sexual assault center and the police and social services departments. Those agencies "participated in the investigation or evaluation of the action" and "either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney."[5] Whether Ms. Burke had some subjective belief that her notes were privileged, as the State now claims, is quite beside the point.[6] Under the governing legal precepts, this material was available to the prosecutor, whether or not it was physically in his files.

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[5] This does not mean, of course, that every piece of information on every document in the hands of those agencies is necessarily subject to disclosure. The information must first fall within the ambit of sections (a) or (b) of the Rule, and, even if it does, subject obviously to Constitutional constraints, section (i) permits the court, upon good cause shown, to order "that specified disclosures be restricted."

[6] Ms. Burke acknowledged her awareness that "[i]nformation is shared . . . if there is a suspicion of child abuse." In light of that, in light of her allowing Assistant State's Attorney O'Donnell to sit in on 12 therapy sessions with Brooke, in light of her dozen or so further telephone conversations with Ms. O'Donnell, in light of the acknowledgment form signed by Mrs. Etze, of which Ms. Burke was aware, and in light of the statute requiring reports to be made to the State's Attorney "[n]otwithstanding any law on privileged communications," we find it difficult to understand how Ms. Burke could reasonably have supposed that her notes would not be obtainable by the State's Attorney's Office.

(4) *Exculpatory Quality—Materiality*

There is, of course, a close relationship between the extent to which information is exculpatory and the extent to which it was material, and so we shall consider these two elements together. Did any of it tend to negate or mitigate Ms. Craig's guilt, and, if so, would it, evaluated in the context of the entire record, have created a reasonable doubt that did not otherwise exist?

The case against Ms. Craig rested, to a large extent, on the credibility of Brooke, who was the lead-off witness. Brooke testified that Ms. Craig had kicked her "in my leg" and "[i]n my privates," and had stuck her with thumbtacks. She said that Ms. Craig had touched her with a stick "[i]n my private parts," which she defined as "[h]ere between my legs," and that this had occurred "[a] lot of times," sometimes "in the woods and sometimes in her office." She stated that Ms. Craig made up rules requiring the children to hurt each other. When asked why she did not tell her parents about these incidents, Brooke said that she was afraid because Ms. Craig had told her that "my parents wouldn't love me any more," that "my parents would get a divorce," and that "she would kill me."

On cross-examination, which was lengthy, Brooke twice stated that the stick wielded by Ms. Craig never went into her body—that she was simply hit with it. Although she claimed that other children at the school occasionally chased her or threw sticks, she denied that they had ever actually hit her or bit her or touched her "privates" with sticks. The thrust of her testimony was that the physical and sexual abuse of her was committed solely by Ms. Craig.

Dr. Charles Shubin, a pediatrician with considerable experience in dealing with abused children, examined Brooke at the request of the State. He testified that her hymen was "gaped open" to a 15 mm diameter, which was nearly four times the "absolute upper limit of normal" published by the American Medical Association. In addition, he said,

"the hymen itself was not normal." Instead of being "circumferential all the way around the fold of the vagina," as it should have been, "the lower edge was considerably thickened." There was, in addition, "a retracted scar." In summary, Dr. Shubin stated that "[t]hese are clearly very abnormal findings and which represent very clear healed injury to this child." As to causation of that injury, Dr. Shubin stated,

> "To cause injury to that tissue, stretch it, tear it, scar it would require pushing past an inch and a quarter with some penetrating force. Some object would have to be pushed into this child past an inch and a quarter which would be the normal range of motion to this tissue to cause the injury that we see in this diagram [that he drew for the jury]."

Dr. Shubin said that "[i]t's not possible just by examining her to say for sure what that object was and certainly impossible to say who did it" and, because the injury had healed, it was equally impossible "to say with certainty when it happened." He was quite certain, however, that the abnormal findings "were caused by the penetration of something inside of the body." A "blow or an injury to the external part of Brooke Etze's body," he said, would not have caused that kind of injury; "[i]t requires penetration into the child's body of an object small enough to fit into that area."

This opinion by Dr. Shubin was, of course, inconsistent with Brooke's testimony that the stick used by Ms. Craig had not entered her body. Dr. Shubin dismissed the inconsistency with the assertion that "I'm not aware that children are able to easily tell what inside the body means or not."

Dr. Shubin's testimony set the stage for testimony from Ms. Burke as to the revelations made to her by Brooke. She testified that Brooke had told her, during the therapy

sessions, that Ms. Craig had "stuck her in the privates with a stick," that she had kicked Brooke on the legs and "in the private parts," stuck her with thumbtacks, and threatened that, if she told anyone about these incidents, her parents "will divorce, that they will abandon her or won't come to get her again." When asked how consistent Brooke was "in her disclosures that Mrs. Craig is the person who did these things to her," Ms. Burke responded, "She was totally consistent."

Ms. Craig complains specifically about the non-disclosure of 34 items contained principally in Ms. Burke's therapy notes and in two intake reports. They seem to fall into two categories—complaints by Brooke and some of the other children of abuse by persons other than Ms. Craig, and impressions by Ms. Burke of Brooke's credibility.

An examination of the items falling within the first category reveals that, with one possible exception discussed below, none of it directly exculpates Ms. Craig. Nowhere is there to be found a statement by Brooke (or by anyone else) that Ms. Craig did not kick her, or touch her "privates" with a stick, or stick her with thumbtacks, or encourage the children to abuse one another, or threaten her. Nor, with that one possible exception, did any of those items purport to attribute the vaginal injury described by Dr. Shubin to any third party to the exclusion of Ms. Craig. They simply record statements by Brooke and some of the other child-witnesses that Jamal, Mika, and some of the other children at the school, also mistreated Brooke and the other child-witnesses.[7]

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[7] One item, of a somewhat different character, appeared in Ms. Burke's therapy notes on another child-witness, Justin. Among some undated notes is found the statement, "Denied that anyone touched him in a way he didn't like but stated that Mrs. Craig would stop touching him so he could have his snack[.] Where: abdomen & back." Ignoring the balance of the statement, Ms. Craig sees great significance in the first part—"Denied that anyone touched him in a way he didn't

Although it is clear that impeachment evidence falls within the *Brady* rule and must be disclosed (see *United States v. Bagley*, *supra*, 473 U.S. at 676, 105 S.Ct. at 3380), a statement that someone other than the defendant *also* abused the victim does not necessarily detract from the evidence as to the defendant's conduct or directly tend to negate or mitigate her guilt. The bulk of this material, then, if exculpatory or of impeachment quality at all, is only marginally so. A good bit of that information, moreover—in particular, Brooke's assertions of mistreatment at the hands of Jamal, Mika, and at least five other children—was made known to defense counsel through the open file discovery and was used by him in cross-examining Brooke's mother.[8]

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like"—as that was inconsistent with Justin's trial testimony that Ms. Craig had sexually abused him. Ms. Burke testified at the post-trial proceeding that this note reflected what Justin's mother had told Ms. Burke Justin had said to his pediatrician, Dr. "Bob" Irwin. Justin had never said any such thing to Ms. Burke, and Ms. Burke had never discussed it with Dr. Irwin. Neither Justin's mother nor Dr. Irwin were called as witnesses to shed any light on what, exactly, Justin had said. The note, then, represents a double-level hearsay statement which post-trial counsel could have, but did not, explore.

[8] As we indicated, Ms. Burke prepared a written report summarizing her therapy sessions with Brooke from July 28—September 2, 1986. In that report, she recounted assertions by Brooke that "Stacy touched her breast on top of her clothes," that "[a] child at Sunday school touched her 'down there[']' (points to crotch) and knocked her over," that Katie and Randy (other children at Craig's school) had told her to strip, and touched her stomach, her breast, and "across her bottom," that Salem had "reached down the front of her blouse to retrieve a toy," that "some other child" had touched her on the breasts and "touched" her with a stick, and that Jamal did " 'biting kisses' on Brooke's chest and neck; that he had had his clothes off and had 'touched his body against mine.' " Ms. Burke sent that report and a later addendum to it to the State's Attorney who turned it over to defense counsel as part of the open file discovery. Although counsel did not question Brooke about these assertions, he did ask Mrs. Etse whether Brooke had ever mentioned these incidents to her. She replied in the negative.

There was one item in this category, however, that was not made known to counsel and that requires more specific consideration.

In Ms. Burke's file was a copy of the written report of Dr. Shubin's examination of Brooke, and appended to it was a copy of a handwritten note from Ms. Burke to Fred Levi, of the protective services division of the county department of social services. The note says, in relevant part, "Am going to refer Brooke for therapy next week. *Implicated Mika as perpetrator when speaking* [*with*] *Shubin.*" (Emphasis added.) When questioned about that note at the hearing on the new trial motion, Ms. Burke indicated that this information had come to her through Brooke's parents, who were present during the examination of Brooke by Dr. Shubin. She had not discussed it with Dr. Shubin and claimed to have no recollection of what she thought of it when it was brought to her attention. Notwithstanding her statement, "[i]mplicated Mika as perpetrator," Ms. Burke said that her own notes "simply indicate . . . that she [Brooke] told Dr. [Shubin] that somebody hurt me down there, and they don't indicate who."

Dr. Shubin was not called to testify at the hearings on the motion for new trial; nor were Brooke's parents. They, of course, could have testified as to what, if anything, Brooke actually said to Dr. Shubin. As it is, all that we have is this somewhat cryptic note recording a double-level hearsay statement and Ms. Burke's somewhat vague explanation. On this record, we are unwilling to presume, as Ms. Craig urges us to do, that Brooke in fact exculpated her by attributing the vaginal injury solely to Mika. The note is, at best, an invitation to further inquiry, which, when pursued as post-trial counsel chose to pursue it, revealed nothing. Assistant State's Attorney O'Donnell testified that she was unaware of the note until shown it at the new trial hearing, and that neither Ms. Burke nor Dr. Shubin had ever mentioned to her any such statement by Brooke.

The principal item in the second category came from an intake summary prepared by department of social services intake worker K. McKone on August 19, 1986, which was just after the first therapy session at which Brooke began to make disclosures leading Ms. Burke to contact the department. In the part of the summary entitled "Description of Abuse or Neglect," Ms. McKone states:

> "Brooke is currently being evaluated at the SAC [Sexual Assault Center] and has had several sessions with Ms. Burke. During play therapy Brooke has disclosed that someone had touched her private parts, and she pointed to the crotch area of a doll. She said 'Roger' (fictitious name) touched her with a stick and it hurt a lot. There is no validation yet of who did this to her and where although she did attend Craig[']s Country Pre-school. *According to Ms. Burke fantasy & reality are mixed up for this child* and continued efforts will be made to determine what happened to her through continued evaluation. Next session is on 8/25—10 AM."

(Emphasis added.)

Although Ms. Craig complains of the passage concerning "Roger," she calls particular attention to the emphasized portion indicating a belief by Ms. Burke that fantasy and reality were "mixed up" for Brooke. When questioned about that at the new trial motion hearing, Ms. Burke said that she had no recollection of making that particular statement, and that it "doesn't sound like a statement I would have made, to a Protective Service worker." She allowed, however, that it may have been Ms. McKone's "perception of what I was saying." Ms. Burke acknowledged "in a clinical sense that fantasy and reality were mixed for that child at that time." She continued that "that would have been typical of a child who's working through abuse dynamics," that "young children frequently

mix fact in with other types of information which are distortions. Sometimes they are motivated that out of guilt, sometimes out of fear, that everything gets rolled up together." At no point in her lengthy examination, however, did Ms. Burke indicate any belief that Brooke's accusations against Ms. Craig were inaccurate or untruthful.

The trial court reviewed each of the passages complained of by Ms. Craig in the context of the documents whence they came, the extensive testimony concerning them, and the evidence presented at trial. It observed that there was "testimony going everywhere in this case. There was testimony that the jury could pick and choose." The items at issue here, it held,

> "it's not such evidence as in my judgment would probably have affected the outcome of the case. It would have just been other inconsistent statements, evidence that this jury could have perhaps reviewed and considered, but not evidence which, in my judgment, would have affected the outcome of the case."

We are not persuaded that the trial court's overall assessment was wrong.

We observe initially that none of this newly discovered evidence would, in any manner, serve to negate or mitigate Ms. Craig's guilt under Counts 3, 5, or 6 (child abuse, assault, and battery). It in no way detracts from the evidence that Ms. Craig kicked Brooke or stuck her with thumbtacks. At best, it goes only to the alleged sexual abuse, in particular whether Ms. Craig inserted a stick into Brooke's vagina, and thus pertains only to Counts 1, 2, and 4.

There was, as we have indicated, some inconsistent testimony at trial, and some of it laid open the question of

Brooke's credibility.[9] She specifically denied that other children had kicked, hit, or bitten her, whereas Ms. Burke recounted some of her statements to the contrary. Brooke's mother testified to specific instances of Brooke's not telling the truth, one of which involved a false accusation against another child. She conceded that "to a degree, a typical amount," there was a problem with "Brooke making up stories." She said, in particular, that, according to one of Brooke's teachers, "it was a problem at school." Trial counsel had and used Ms. Burke's reports recounting Brooke's accusations of sexual abuse or touchings on the part of Jamal and at least five other children (see n. 8, *ante*).

Viewing the undisclosed material and the explanations of it developed post-trial in the light of the evidence presented at trial, we are unable to conclude that this material (1) necessarily negated or mitigated Ms. Craig's guilt (or punishment) or (2) sufficed to create a reasonable doubt that did not otherwise exist. We are simply not persuaded that the trial judge erred in his conclusion that, even if the relevant and admissible evidence (along with the attendant explanations of it) developed post-trial had been before the jury, the verdicts would not likely have been any different.

II. SUFFICIENCY OF THE INDICTMENT

Ms. Craig makes two attacks on the indictment: (1) that the allegation as to when the offenses were committed—"during the period of September 1984 to June 1986"—was too broad and uncertain; and (2) that the indictment failed to inform her of the specific conduct charged. Although she claims that these complaints were effectively preserved for appellate review, she argues that, if they

[9] There were also, we might add, some inconsistencies and contradictions in the defense.

were not so preserved, it was due to the incompetence of trial counsel, which would justify relief on that basis.

We begin by noting the requirement of Md. Rule 4-252(a) that "[a] defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense" must be raised "by motion in conformity with this Rule and if not so raised [is] waived unless the court, for good cause shown, orders otherwise. . . ." With exceptions not alleged or relevant here, a motion under § 4-252(a) must be filed within 30 days after the appearance of counsel. It must state the grounds on which it is made and the relief sought.

No such motion is in the record before us; nor is there any reference to one in the docket entries. It appears that counsel filed a paper entitled "Motions Pursuant To Maryland Rule 4-252" in another case (No. 15461), apparently intending it to apply to all cases against Ms. Craig. The motion is captioned as "Case #: 15461, and others" and seeks a variety of different relief, including dismissal of the indictment on the ground "[t]hat the indictment/information is defective." Although two cases (*Ayre v. State*, 291 Md. 155, 433 A.2d 1150 (1981), and *Brown v. State*, 285 Md. 105, 400 A.2d 1133 (1979)) are cited for that proposition, there is no averment as to how or why the indictment is defective—merely the bald allegation that it is so.

Quite apart from the failure to file the motion in this proceeding,[10] we do not regard that bald statement as adequate compliance with the requirement that the motion "state the grounds upon which it is made." Certainly, it did not suffice to raise either of the two particular complaints made here. Unless those alleged defects constitute

[10] The State conceded at oral argument that the State's Attorney was aware of the motion and apparently regarded it as applying in this case.

a failure to show jurisdiction in the court or to charge an offense, therefore, they have been waived, notwithstanding that the trial court allowed Ms. Craig to raise the issue in her motions for new trial.

Md. Rule 4-202(a) requires a charging document to state "with reasonable particularity" the time the offense occurred. But time is not ordinarily regarded an element of the offense or germane to jurisdiction, and it is certainly not so in this instance. The alleged violation in this regard, moreover, is not a complete absence of an allegation as to time but rather a violation of the "reasonable particularity" requirement. That is a matter that should and could have been raised by pre-trial motion when, if found to be meritorious, it could have been addressed and presumably corrected. The Rule does not allow such a complaint to be held until after trial has occurred and a verdict rendered. Ms. Craig's first complaint, as to time, has been waived.

Her second complaint, which she characterizes as a failure to charge an offense, is simply without substantive merit. In *Williams v. State*, 302 Md. 787, 791, 490 A.2d 1277 (1985), and later in *State v. Chaney*, 304 Md. 21, 497 A.2d 152 (1985), *cert. denied* 474 U.S. 1067, 106 S.Ct. 824, 88 L.Ed.2d 796 (1986), the Court made clear that not every deficiency in setting forth the elements of the offense or the particular conduct charged amounts to a jurisdictional defect. As stated in *Chaney*, 304 Md. at 25-26, 497 A.2d 152:

> "We said [in *Williams*] that a claim that an indictment fails to charge or characterize a crime is jurisdictional and may be raised at any time. But in determining, for jurisdictional purposes, whether an indictment sufficiently charges and characterizes a crime, we made clear in *Williams* that merely because the charging document does not allege, expressly or by implication, every essential element of an offense does not necessarily mean that no cognizable crime within the court's subject-matter jurisdiction has been charged. We said that while the customary method of identifying a particular crime charged in an indictment has been to aver its essential elements, that method is not exclusive 'and the use of other words that sufficiently characterize the crime will satisfy the jurisdictional requirement.' "

The language of the indictment here suffices, in our view, to charge the six offenses upon which Ms. Craig was tried and convicted.[11] Any complaint as to lack of speci-

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[11] The indictment charged that Ms. Craig:

> "1. Did unlawfully engage in a sexual act with another person, to wit: Brook[e] Etze, by force or threat of force against her will and without her consent and did threaten or place Brook[e] Etze in fear that she or her parents would be imminently subjected to serious physical injury, in violation of Art. 27, Sec. 464, of the Annotated Code of Maryland contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State. (Sexual Offense—1st degree—Art. 27, Sec. 464)
>
> 2. Did unlawfully engage in a sexual act with Brook[e] Etze, a person under 14 years of age when the said Sandra Ann Craig, the person performing the sexual act is four or more years older than the said Brook[e] Etze, in violation of Art. 27, Sec. 464A, of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State. (Sexual Offense—2nd degree—Art. 27, Sec. 464A)
>
> 3. Did unlawfully as a guardian having care, custody and responsibility for the supervision of one Brook[e] Etze, a minor child under the age of eighteen years, cause abuse to the said Brook[e] Etze, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State. (Child

ficity in the precise conduct has also, therefore, been waived.

We shall defer, at this point, Ms. Craig's complaint about the competence of her trial counsel but shall consider her several complaints in that regard later in this Opinion.

III. TESTIMONY THROUGH CLOSED CIRCUIT TELEVISION

Subject to certain conditions set forth in the statute, Md.Code Ann.Cts. & Jud.Proc. art., § 9-102(a) provides that, in a case of child abuse, the court

> "may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

Abuse—Art. 27, Sec. 35A)

4. Did unlawfully commit a certain unnatural and perverted sexual practice with Brook[e] Etze, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State. (Perverted Practice—Art. 27, Sec. 554)

5. Did unlawfully make an assault upon Brook[e] Etze, contrary to the form of the Common Law, in such case made and provided, and against the peace, government and dignity of the State. (Assault—C/L)

6. Did unlawfully commit a battery upon Brook[e] Etze, contrary to the form of the Common Law, and against the peace, government and dignity of the State. (Battery—C/L)"

Applying this statute, the court allowed Brooke (and several other children) to testify in the proceeding from the judge's chambers, with counsel present, through closed circuit television.

Ms. Craig contends: (1) § 9-102 and the procedure authorized by it violate her Constitutional right of confrontation; (2) the court failed to follow the proper procedure in concluding that the children would suffer serious emotional distress such that they would be unable to reasonably communicate if required to testify in court; and (3) the procedure authorized by § 9-102 and used in this case violated her right of presence.

(1) *Confrontation*

When this case was tried, the parties and the court were without the benefit of any controlling appellate consideration and construction of § 9-102. After the verdicts were announced, the Court of Appeals decided *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987), in which it considered a number of challenges to § 9-102, including claims that the procedure authorized by the statute contravened a defendant's rights of confrontation and presence. *Wildermuth* then became the focus of Ms. Craig's attack on the procedure used at trial, both at the hearings on the motions for new trial and in argument before us. More recently, however, the United States Supreme Court decided *Coy v. Iowa*, ___ U.S. ___, ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), in which it too addressed the confrontation issues raised by procedures impairing face-to-face contact between child-witnesses and defendants on trial for having allegedly abused them.

Coy was charged with having assaulted two 13-year old girls as they slept in a tent in the backyard of their house. As the man who attacked them wore a stocking mask over his head and shined a flashlight in their eyes, the girls were unable to identify their assailant; they were not asked

at trial to identify Coy.[12] Although no inquiry was made as to whether the victims would be able to present their testimony in Coy's presence, and the judge made no finding that they would be unable to do so, the trial court, acting pursuant to a recently enacted Iowa statute, permitted a semi-opaque screen to be placed in the courtroom between Coy and the witness stand. With certain adjustments to the lighting in the courtroom, the screen enabled Coy "dimly to perceive the witnesses" but totally precluded the witnesses from seeing Coy. The State sought to excuse the lack of any specific finding of necessity for separating the victims from the defendant on the ground that the statute authorizing the procedure "create[d] a legislatively imposed presumption of trauma" and thus *ipso facto* established the necessity. It urged as well that, as Coy's right of cross-examination was not impaired by the screen, there was, in fact, no violation of his right of confrontation.

In an Opinion authored by Justice Scalia, in which five other Justices joined, the Supreme Court rejected both arguments. As to the latter, the Court made clear that the right of confrontation entails more than just the right to cross-examine. Repeatedly, Justice Scalia referred to the concomitant right, of even longer historical standing, to meet one's accuser "face to face." Beyond even earlier Supreme Court decisions and English common law antecedents, he quoted from Shakespeare (Richard II), the New Testament (Acts 25:16), and a 1953 speech made by President Eisenhower to the B'nai B'rith Anti-Defamation League for the proposition that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in

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[12] Coy lived next door to one or both of the victims. He was convicted largely on physical evidence seized from his home—principally a cup, a flashlight, and a battery that the girls said the assailant had taken from their tent. See *State v. Coy*, 397 N.W.2d 730 (Iowa 1986).

a criminal prosecution.' " Thus, he announced, "[w]e have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." ___ U.S. at ___, 108 S.Ct. at 2800. The screen, said Justice Scalia, "was specifically designed to enable the complaining witnesses to avoid viewing [Coy] as they gave their testimony, and the record indicates that it was successful in this objective. . . . It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."

With that, Justice Scalia turned to the State's argument that the confrontation issue at stake was outweighed by the need to protect victims of sexual abuse. He recognized that, in earlier decisions, the Court had held that "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests" but concluded that

> "The rights referred to in those cases . . . were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine . . . ; the right to exclude out-of-court statements . . . ; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself. . . . To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.' . . . *We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed*

> *only when necessary to further an important public policy.*"

Id. at ___, 108 S.Ct. at 2802-03. (Emphasis on last two sentences added; citations omitted.)

Extending that last statement, Justice Scalia specifically rejected the notion that the Iowa statute could, of itself, supply the necessity: "The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. *Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.*" *Id.* at ___, 108 S.Ct. at 2803. (Emphasis added.)

Justice Scalia, as we indicated, wrote for himself and five other Justices, including Justices White and O'Connor. Those two Justices, however, filed a Concurring Opinion, authored by Justice O'Connor, to make clear their view that the right to face-to-face confrontation, which they agreed had been violated in that case, was "not absolute but rather may give way in an appropriate case to other competing interests *so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.*" *Id.* (Emphasis added.) They recognized that child abuse was a problem "of disturbing proportions in today's society," that it was "one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim," and that, even when "an instance of abuse is identified and prosecution undertaken, new difficulties arise" from the fact that "a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom. . . . " They observed that many States had, as a result, enacted statutes authorizing a variety of procedures to shield a child-witness, calling attention, in particular, to the fact that about half of the States permit the child's testimony to be given through closed circuit

television, sometimes with and sometimes without the defendant's being present in the same room. The point of their concurrence was "to make clear *that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses.*" *Id.* (Emphasis added.)

In furtherance of that point, Justices O'Connor and White concluded that "even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use." There is nothing novel, they said, about the proposition that the Clause embodies a general requirement that a witness face the defendant. "But it is also not novel to recognize that a defendant's 'right physically to face those who testify against him,' . . . even if located at the 'core' of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion." The core of the concurrence was then stated as follows:

> "In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.
>
> Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . *The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy.* The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. *But if a court makes a case-specific finding of necessity, as is required by a number of state statutes . . . our*

cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it."

Id. at ___, 108 S.Ct. at 2805. (Emphasis added.)

Although Justice Scalia took some pains in his majority Opinion to rebut points made by Justice Blackmun and Chief Justice Rehnquist in dissent, he made no comment at all with respect to the concurring opinion; of particular significance, we think, he chose not to comment on the passage quoted immediately above or to suggest that Justices O'Connor and White had misread either his Opinion or his intentions.

We glean at least three things from what the Justices, in their respective opinions, had to say: (1) the Court did not firmly conclude that the "face-to-face" requirement embodied in the Clause was absolute and would admit of no exceptions but simply left that question "for another day"; (2) nor did it rule out the prospect of recognizing as such an exception the State's interest in protecting child-witnesses from trauma associated with testifying in open court in the defendant's close presence; and (3) to the extent that language in Justice Scalia's opinion might suggest that a closed circuit television arrangement based on a "case-specific finding of necessity" would be regarded as impermissible under the Confrontation Clause, that view was not shared by more than four of the Justices who sat on the case.[13]

The issue that the Supreme Court chose to reserve for another day is upon us in this case and must therefore, of necessity, be decided by us today. Guided in part by the Court of Appeals' analysis in *Wildermuth*, we are in-

[13] Justice Kennedy took no part in the consideration or decision of the case. His view of the matter has yet to be announced.

clined to the view expressed by Justice O'Connor in her concurring opinion. In accordance with, and to some extent extrapolating, that view, we hold that (1) the requirement of a face-to-face meeting in court is *not* absolute, but *does* admit of exceptions; (2) where a face-to-face meeting would, in fact, so traumatize a child-witness as to prevent him or her from reasonably communicating, the State may provide for that testimony to be taken in a setting that, as nearly as practicable, preserves all other aspects embodied in the right of confrontation, but does not require the witness to look directly upon the defendant or to testify in his direct physical presence; and (3) if § 9-102 is implemented in the manner prescribed by *Wildermuth*, that implementation will not be deemed so violative of the defendant's right of confrontation as to constitute reversible error.

The procedure authorized by § 9-102 and used in this case was essentially as follows. The judge, Ms. Craig, one of her attorneys, and a prosecutor remained in the courtroom with the jury. The witness testified from the judge's chambers in the presence of a prosecutor, Ms. Craig's lead counsel, and a technician. The testimony was broadcast through closed circuit television to the courtroom where everyone there could see and hear it on one or more monitors. There was a private telephone line allowing two-way communication between Ms. Craig (and the attorney with her) and her attorney in the judge's chambers.

It is evident that this arrangement did not amount to the kind of face-to-face confrontation that the Supreme Court held was envisioned by the Sixth Amendment. The defendant and the witnesses were in different rooms, unable to see or hear each other directly. The witnesses, it would appear, were unable to see or hear Ms. Craig at all, as the broadcasting was one-way from the chambers to the courtroom; Ms. Craig could see and hear the witnesses but only through electronic means. It follows, then, that, if the face-to-face requirement, as explicated by Jus-

tice Scalia, is indeed absolute and admitting of no exceptions, this procedure would not pass muster.

We do not believe that the requirement is so rigid, however. Neither the Supreme Court nor the Maryland Court of Appeals—the two courts that bind us—has ever held any aspect of the Confrontation Clause, and certainly not this aspect of it, to be so absolute. Moreover, when one considers the "exceptions" that *have* been allowed—in particular the use of extra-judicial declarations based on a firmly rooted exception to the hearsay rule (*Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986))—they nearly always involve a situation in which evidence is given without a face-to-face confrontation at trial. That the challenge to such evidence may have been couched in terms of the right of cross-examination or some other right embodied in the Confrontation Clause does not detract from that simple fact. *Coy* did not purport to overrule *Roberts*, or *Inadi*, or any of the other decisions allowing the use of extra-judicial declarations at trial under limited circumstances, and yet, it would seem to us, that would be precisely its effect if the "face-to-face" requirement, as interpreted by Justice Scalia, were regarded as absolute and unyielding. We construe the majority Opinion in *Coy* as did the concurring Justices, as simply striking down the procedure used in that case and reserving for further consideration whether the more common approaches authorized by most of the States will suffice.

On that assumption, we may return to *Wildermuth*, where, although the point was apparently conceded by the defendants, the Court made clear its own view that the right of face-to-face confrontation "fundamental as it is, is not absolute. It 'must occasionally give way to considerations of public policy and the necessities of the case.' " 310 Md. at 514, 530 A.2d 275, quoting in part from *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 340, 39

L.Ed. 409 (1895). That suffices, for us, to establish the flexible quality of this right.

Having concluded that the right of face-to-face confrontation could yield to other considerations of public policy, the *Wildermuth* Court proceeded to examine the confrontation issue further in the context of the requirements set forth in *Ohio v. Roberts*, *supra*, 448 U.S. 56, 100 S.Ct. 2531, that in order to accept evidence in derogation of that right, even if generally permissible, there must be a showing (1) that the witness is "unavailable" and (2) that the statement offered from the witness bears adequate "indicia of reliability." The *Wildermuth* Court concluded that a finding under § 9-102(a)(1)(ii)—that, if required to testify in open court the child would suffer serious emotional distress and be unable to "reasonably communicate"—was "tantamount to a finding of unavailability in the *Roberts* sense, and meets the necessity prong of the *Roberts* test." 310 Md. at 519, 530 A.2d 275. The Court also found that the statute "provides for most of the aspects of confrontation that enhance the reliability of testimony" and therefore also satisfied the "reliability" prong of the *Roberts* test. *Id.*, at 515, 530 A.2d 275. Thus, it held at 520, that "[t]he degree of confrontation allowed by § 9-102 . . . satisfies the constitutional requirements if there is compliance with subsection (a)(1)(ii) as a condition precedent to application of the statute."

Implicit in this examination is the underlying conclusion that the State has a legitimate and compelling interest in authorizing this kind of procedure, but, to the extent that conclusion was a tacit one in *Wildermuth*, we shall articulate it now. We conceive that the State has really a two-fold interest in allowing the testimony of a child abuse victim to be given *via* closed circuit television. Paramount, of course, is the fact that, if the child-victim is actually unable to testify otherwise—if he/she would be so "traumatized" by a face-to-face confrontation as to be unable to "reasonably communicate"—the truth of the matter

might never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation, perhaps (and, in some instances, likely) upon the same helpless victim. In addition, although somewhat related, the State has an interest in protecting children generally from trauma, especially trauma that would result from the deliberate action of the State itself. Keeping in mind the threshold requirement in § 9-102, what is to be gained from forcing a child-victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child rather than any meaningful evidence—*in*culpatory or *ex*culpatory? We have no doubt that the procedure authorized by § 9-102 is one that is "necessary to further an important public policy." *Coy v. Iowa*, ___ U.S. at ___, 108 S.Ct. at 2803.

Upon this analysis, we reject the general Confrontation Clause attack made by Ms. Craig.

(2) *Findings As To Unavailability*

In rejecting Iowa's argument of "necessity," Justice Scalia observed that "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." ___ U.S. at ___, 108 S.Ct. at 2803. The implication, of course, is that, if the right to face-to-face confrontation can be dispensed with or impaired at all, the departure must be based upon "individualized findings." It cannot rest upon some general presumption. Justices O'Connor and White were in accord on that, allowing a relaxation of the requirement only upon a "case-specific finding of necessity."

The *Wildermuth* Court reached the same conclusion. Judge Adkins observed for the Court that the statutory standard set forth in § 9-102(a)(1)(ii) was indeed a difficult one, and that, to satisfy the constraints implicit in the

defendant's right of confrontation, there must be "a specific demonstration that the particular child witness concerned crosses the high statutory threshold." 310 Md. at 523, 530 A.2d 275. In that regard, the Court held, at 523-24, 530 A.2d 275:

> "While personal observation by the judge may not be a *sine qua non* under § 9-102, it should be the rule rather than the exception. . . .
>
> On the one hand, a judge's subjective and self-justifying recollections of a child's demeanor, absent support in the record, will not be enough to justify a finding that limits the right of confrontations [sic]. . . . On the other hand, expert testimony may not be essential to establish the necessary predicate. . . . For example, the testimony of a parent may be sufficient, when combined with the child's own testimony and judicial observation of the child. . . .
>
> We shall not attempt to list all the possible ways in which evidence may meet the standard or all the ways in which it may fall short. We repeat, however, that ordinarily the judge should observe and question the child. Additionally, testimony about the likely impact on the particular child must be specific and must show much more than mere nervousness or excitement or some reluctance to testify. . . . While the testimony need not be given in the precise words of the statute, it must be clear that the statutory requirements are met in substance. . . . Testimony about the likely impact on the child testifying must be definite, related to the statutory standard, and specific to the potential child witness him or herself."

(Citations omitted; footnote omitted.)

In *Wildermuth*, the trial court's finding was based exclusively on testimony from two social workers as to the difficulty that children in general might have testifying in court with the alleged abuser present. One witness opined that any child would find it "hard to respond at all in the courtroom." *Id.*, at 523, 530 A.2d 275. The other's testimony, though "more specific, indicating some degree of intimidation and a greater likelihood of inability to respond," still was couched in terms of "all children as a group." *Id.* The judge "never questioned or even observed the child witness before he made his ruling." *Id.* That, said the Court, did not suffice.

The case at bar is quite different. The testimony supporting the court's ruling here was far more specific than in *Wildermuth* and focused on each child. Ms. Burke, who had considerable experience in working with abused children, testified with respect to Brooke. She had observed Brooke in 20 therapy sessions, each lasting an hour to an hour and a half. Citing both Brooke's age and her perception of having been threatened, Ms. Burke opined that "it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents." She "would probably stop talking and she would withdraw and curl up."

Similar testimony was given with respect to the other child-witnesses who testified *via* closed circuit television. Ms. Burke treated two of those children, in addition to Brooke. One of them—Justin—Ms. Burke had seen in 18 therapy sessions. Seeing Ms. Craig as a "threatening figure," she said, "[h]e's had difficulty talking—making his disclosures to other people including police and protective services. He tends to change the subject which is his manner of avoiding the issue. He becomes agitated and depressed. He bursts into tears and would be unwilling or unable at that point to proceed." Of a third child—Jessie—seen in 36 therapy sessions, Ms. Burke said:

> "As to Mrs. Craig, she perceives herself, again, as her life has been threatened, that of her parents and her sibling too. She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations."

The fourth child-witness was being treated by Dr. Gladys Sweeney, a psychologist, who said of him: "he has experienced [an] extreme level of high anxiety and distress by talking about this very traumatic event and that his ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig."

The testimony here, as to each child, was specific; it showed "much more than mere nervousness or excitement or some reluctance to testify." It was upon that evidence that the court found, as a fact, that

> "the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and its [sic] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102. . . . "[14]

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[14] The court's statement spoke to the effect of the children's testifying "in a courtroom," which is also the focus of § 9-102(a)(1)(ii). Given the context of the issue, however—the State's motion, the evidence given by Ms. Burke and Dr. Sweeney, and the argument of counsel—it is apparent that the court's concern was not so much forcing the children

Ms. Craig seemingly ignores the thrust of this evidence, concentrating instead on the fact that the judge did not examine each child directly. In the first place, as *Wildermuth* itself makes clear, personal observation of the child by the judge is not a *sine qua non* under § 9-102. We note, however, that the court here *did* have an opportunity to observe each child prior to his or her actual televised testimony, in the context of a *voir dire* examination as to their competence. Finally, although the *Wildermuth* opinion was not available when the children testified, it was available and was considered by the court in the post-trial proceeding. We assume that, in response to Ms. Craig's challenge, the court reconsidered its recollections and impressions in light of what the Court of Appeals said was required. In summary, we find no error.

(3) *Right Of Presence*

In addition to the confrontation issue, the *Wildermuth* Court considered the argument that the closed circuit television procedure authorized by § 9-102 violated the defendant's common law and due process right of presence in that "the witness testified in a separate room, in which he was not permitted." 310 Md. at 529, 530 A.2d 275. The Court rejected the argument, observing that the defendant "could see the witness as she testified, could hear the questions asked of her and her responses, and could communicate with his lawyer in order to convey information or suggest questions to ask." Thus, the Court held, "[t]he statutory procedure did not thwart a fair and just hearing in terms of due process" and there was "no violation of [the defendant's] due process right to be present." *Id.*, at 529, 530 A.2d 275. Nor, it continued, was

to testify in open court as requiring them to testify in the direct presence of Ms. Craig. We think it evident that the finding by the court, though couched in the statutory language, addressed that concern.

there any violation of the common law right of presence, which had obviously been modified by the statute.

Ms. Craig seeks to distinguish her case from *Wildermuth* principally on the basis that she was "unable to communicate contemporaneously with her counsel who was in chambers with the children during their testimony." In particular, she contends that the telephone line between the courtroom, where she was sitting with co-counsel, and the judge's chambers, where counsel was present with the witness, "was sufficiently disfunctional so as to deprive [her] the constant, reliable and contemporaneous communication with her attorney. . . . " The record does not bear that out.

The process was explained at the outset; there would be, and was, an open telephone line between counsel in chambers and Ms. Craig and co-counsel in the courtroom. Indeed, counsel specifically informed his client that, if she wanted to speak with him, "you merely talk on that telephone and that no one else is permitted to listen to that conversation." Ms. Craig's first complaint came after Brooke's *voir dire* examination as to competence. Brooke apparently let her voice drop a number of times, and Ms. Craig later said that "she could only hear part of what the child was saying." She did not ask that the examination be repeated, or indeed for any other relief.[15]

Following the *voir dire* examination, but before any testimony by Brooke, counsel complained that his co-counsel had been unable to communicate with him. The court recessed and the problem was supposedly corrected. Twice more, however, counsel complained that Ms. Craig had been unable to communicate with him, but again no spe-

[15] Counsel did ask the court to explore some other areas with Brooke, which the court declined to do, concluding that those areas did not relate to competence and suggesting that they be explored on cross-examination.

cific relief was requested. The first instance came during counsel's cross-examination of Brooke. The court instructed co-counsel to interrupt the proceeding and inform the court if the problem recurred, and counsel thereupon resumed his cross-examination, apparently with the benefit of whatever Ms. Craig wanted to tell him. Following the State's brief redirect examination, counsel again noted that his client had been unable to reach him. He said that Ms. Craig had given him several questions to ask, and he sought leave to reopen his cross-examination to ask those questions. Permission was given and the questions were asked. Indeed, the cross-examination continued for nine pages of transcript.

On this record, we fail to see any prejudice to Ms. Craig.

IV. THERAPIST'S OPINION

Taking a brief excerpt from Ms. Burke's testimony wholly out of context, Ms. Craig urges that the court allowed Ms. Burke, who was not qualified as an expert, to render an opinion that Brooke had been the victim of child abuse. The short answer is that Ms. Burke rendered no such opinion. She was asked to describe the kind of "evaluative services" she rendered for the sexual assault center. In her response, she said that children were referred to the center because of a suspicion that they had been subjected to abuse and that

> "my job at that point would be to help make a determination through interviewing the child, working with them for a period of time, making a determination whether or not the symptoms and the behaviors that are being observed are consistent with those of a child who has been abused or assaulted."

We do not regard that statement—the one of which Ms. Craig complains—as an opinion that Brooke was subjected to abuse by Ms. Craig.

V. REHABILITATION EVIDENCE

Ms. Craig complains here about the court's allowing Mrs. Etze and Ms. Burke to testify as to statements made to them by Brooke regarding the abuse inflicted on her by Ms. Craig. She correctly points out that, under the circumstances in which they were elicited, these hearsay statements would not be admissible as either excited utterances or fresh reports of sexual abuse and could come in only, if at all, as prior consistent statements to bolster Brooke's credibility. That, indeed, was the sole basis on which the court allowed the testimony. Ms. Craig argues, however, that the testimony was inadmissible even for that purpose because (1) Brooke's credibility had not as of then been impeached and (2) the statements at issue were not made prior to the existence of a motive to fabricate, those being the two predicate requirements under current Maryland law for the admission of a prior consistent statement. See *Finke v. State*, 56 Md.App. 450, 492, 468 A.2d 353 (1983), *cert. denied* 299 Md. 425, 474 A.2d 218, *cert. denied* 469 U.S. 1043, 105 S.Ct. 529, 83 L.Ed.2d 416 (1984); *Boone v. State*, 33 Md.App. 1, 363 A.2d 550, *cert. denied* 279 Md. 681 (1976).

The first prong of Ms. Craig's argument proceeds from the fact that, although defense counsel suggested throughout his cross-examination that Brooke had made inconsistent statements to her parents and to Ms. Burke, that she had been coached in her testimony, and that she had been subjected to disapproval or reward depending on her answers, Brooke never admitted or concurred in any of those suggestions. Positing that impeachment can come only from answers and not merely from questions, she urges that, as Brooke never admitted counsel's implied accusations, her credibility had not legally been impeached.

Although the precise issue does not appear to have been clearly decided before in Maryland (cf., however, *Finke v. State*, *supra*, 56 Md.App. at 493-94, 468 A.2d 353), case

law elsewhere indicates that "impeachment" in this regard may arise from the tenor of questioning alone, and even from suggestions of counsel made in argument.

In *Slater v. Baker*, 301 N.W.2d 315 (Minn. 1981), the plaintiff sued a physician for malpractice, alleging his failure to treat a lump in her breast that she claimed had been made known to the defendant during an examination in 1975. The doctor denied having made any such examination and vigorously cross-examined the plaintiff with respect to that alleged examination. Although the plaintiff never retracted her testimony that the examination had occurred, she attempted to introduce testimony from four witnesses of statements made by her in 1975 that the doctor had indeed examined her breast. The appellate court held the testimony admissible on the basis that "[i]mplicit in respondent's vigorous cross-examination of appellant is the claim that she was being less than honest concerning the alleged 1975 examination." 301 N.W.2d at 319.

The California courts have allowed prior consistent statements in the face of a single question on cross-examination suggesting a motive to falsify. See *People v. Armstrong*, 275 Cal.App.2d 30, 79 Cal.Rptr. 668 (1969) (question whether witness had been promised payment for his testimony held to constitute an implication of motive to fabricate even though witness answered in the negative); and *People v. Pic'l*, 114 Cal.App.3d 824, 863, 171 Cal.Rptr. 106 (1981), *rev'd on other grounds* 31 Cal.3d 731, 183 Cal.Rptr. 685, 646 P.2d 847 (1982) (prior consistent statement admissible following question whether witness had been granted immunity coupled with evidence that no criminal charges had been filed; even though witness denied having been granted immunity, "the question to her created the implication that her testimony lacked credibility and that she had a motive to give false testimony"). See also *People v. DeLeon*, 103 Mich.App. 225, 303 N.W.2d 447, 451 (1981):

> "The trial court did not abuse its discretion in allowing into evidence a prior consistent statement made by prosecution witness Garcia. Counsel for the defendant attempted to impeach witness Garcia's testimony on cross-examination *in closing argument by implying that recent fabrication had occurred*. The prosecution was properly allowed to rebut this implication with a prior consistent statement which was made by witness Garcia."

(Emphasis added.)

This rule has been applied as well in child abuse, particularly sexual abuse, cases. In *Dearing v. State*, 100 Nev. 590, 691 P.2d 419, 421 (1984), the Court affirmed the allowance of a child's prior consistent statement where defense counsel "cross-examined the child witness at considerable length with the apparent intention of implying that the child's credibility was questionable." See also *State v. Resendez*, 82 Or.App. 259, 728 P.2d 562 (1986), and *Nusunginya v. State*, 730 P.2d 172 (Alaska App. 1986).

Although some of these cases arose under Uniform Rule of Evidence 801(d)(1)(B), which Maryland has not adopted, in the context of the issue before us here, they are both relevant and persuasive. There is an element of discretion here, and that discretion must be exercised not just on the basis of what a cold record ultimately will show but rather on the basis of the trial judge's perception of what has transpired. Questions alone *can* impeach. Apart from their mere wording, through voice inflections and other mannerisms of the examiner—things that cannot be discerned from the printed record—they can insinuate; they can suggest; they can accuse; they can create an aura in the courtroom that the trial judge can sense but about which we could only speculate. The most persistent denials, even from articulate adult witnesses, may not suffice to

overcome the suspicion they can engender; a child witness, and especially a child victim, may be even more vulnerable.

In ruling on Ms. Craig's objection, the court noted that the whole case generated to that point by the defendant was whether Brooke's account was accurate: "[i]s it the product of coaching, is it the product of . . . being told something by the therapist. . . . " We find no error in the court's conclusion that Brooke's testimony had been sufficiently impeached to allow the prior statements.

We turn then to whether Brooke's revelations to her parents and to Ms. Burke were made prior to the existence of any motive to fabricate.

In this regard, it is important to keep in mind the nature of the alleged motive to fabricate. There was no suggestion here that Brooke's testimony was based on some long-standing ill will against Ms. Craig or that it was the product of some general mendacity on Brooke's part. Nor is this a case in which, at some definable point in time, she either made a clearly inconsistent statement exculpating Ms. Craig or, by virtue of some event or agreement, acquired a previously nonexistent motive to testify against her. The point sought to be made on cross-examination and in the argument of counsel was rather that Brooke was coached into saying what she said on direct examination—that these accusations were the product of suggestion and influence on the part of her parents and Ms. Burke.

The testimony from Mrs. Etze and Ms. Burke was designed to rebut that suggestion. The thrust of it was not the particular statements made by Brooke to her mother or Ms. Burke but rather the process used with Brooke to elicit what had occurred. Both witnesses persistently denied any coaching of Brooke, or of any system of reward and punishment based on her revelations. Both denied specific and direct questioning of Brooke or suggesting what her answers should be. The statements made by Brooke,

beginning in August of 1985, were relevant not because they were made *before* any motive to fabricate but to demonstrate that there *was no* motive to fabricate. The emphasis, particularly of Ms. Burke's testimony, was on the context in which Brooke revealed what had occurred—that she had been silent out of fear and that she began to open up only when made to feel comfortable and safe. The revelations at first were imprecise and hesitant; then they burst forth spontaneously.

This was a fair and proper response to the suggestions made on cross-examination. The particular statements made by Brooke were part of that response, and, in that setting, were properly admitted.

VI. EXCLUSION OF DR. WALDER'S OPINION

As part of her case, Ms. Craig called Dr. Leopold Walder, a clinical psychologist, to testify, based on hypothetical questions, that Brooke's responses were not within a range of what should be expected from victims of child abuse. Dr. Walder had never examined, or even talked with, Brooke, however; nor had he spoken with Ms. Burke or Brooke's parents. He had read Ms. Burke's report, referred to in Part I of this Opinion, summarizing some of the therapy sessions, and based essentially on that he seemed prepared to "present [his] professional opinion on hypotheses about why [Brooke] would say things one way or another," and whether she "reacted consistent with her statements of alleged child abuse."

Acknowledging Dr. Walder's general expertise, the court allowed him to testify "concerning the appropriateness [of] the methodology used in examining the child by [Ms. Burke]." It refused, however, to allow specific testimony concerning "the manifestations of [Brooke] to the issue of child abuse."

We find no error. As we indicated in *Waltermeyer v. State*, 60 Md.App. 69, 79, 480 A.2d 831, *cert. denied* 302 Md. 8, 485 A.2d 249 (1984):

> "[W]e have to start with the basic proposition that the admissibility of expert or opinion testimony is largely within the discretion of the trial court, subject to review on appeal, and that 'the test of admissibility of an expert's opinion should be whether his testimony will be of real appreciable help to the trier of fact in deciding the issue presented.' . . . It follows from this that not every opinion of an expert is admissible, whatever its form or the source of the information upon which it is based."

(Citations omitted.) See also *Simmons v. State*, 313 Md. 33, 542 A.2d 1258 (1988).

It was evident that Dr. Walder knew no more about Brooke than what he had learned from a summary report covering some, but not all, of her therapy sessions. This alone distinguishes this case from *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986), upon which Ms. Craig relies. The expert there, proposing to opine that the victim of an alleged rape suffered from post-traumatic stress disorder, had examined the victim.

VII. "OTHER CRIMES" EVIDENCE

Ruling upon the State's pre-trial motion, the court determined that three children, other than Brooke, who had attended Ms. Craig's school and had allegedly been abused by her would be permitted to testify as to what had occurred to them. Based on the proffer made by the State, the court held that their testimony qualified under a number of exceptions to the rule generally excluding "other crimes" evidence, including that tending to establish a common scheme or design and that tending to establish the identity of the perpetrator.

Pursuant to that ruling, and following *voir dire* examinations as to their competence, those children did indeed testify. Each stated that Ms. Craig had put an object into their anus.[16]

Ms. Craig challenges this testimony on three bases. First, she complains that, during the course of their own therapy, these children had made statements casting doubt on their credibility, that these statements, discovered in Ms. Burke's therapy notes, had not been disclosed to defense counsel, and, had the court been aware of those statements, it may (or would) not have found that the testimony of the children sufficed to show either a common design or identity. Having examined the material cited by Ms. Craig in the context of all the material disclosed to counsel, we find no merit at all to that complaint. Second, she points out that Jamal Craig was charged with the "same sexual child abuse" of one of the children, and that fact alone "undercuts the court's opinion" that the child's testimony demonstrated that Ms. Craig was the actor. We do not see how or why the separate charge against Jamal, as yet untried, makes the child's testimony of what Ms. Craig did inadmissible.

Finally, Ms. Craig argues that the separate indictments against her involving the other three children were "as sweeping in their time frame" as the one involving Brooke, and that it was "as unfair to Ms. Craig to defend against them as against the indictment in this case." That argument was not presented below and therefore is not properly before us now. Md.Rule 8-131.

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[16] One child said that she had "put something cold in my behinney." Another said that Ms. Craig had touched her "box" and her "butt," which she indicated were her vaginal and anal areas, respectively, with a stick. The third claimed that Ms. Craig "poked" his "hiney" with a "screwdriver."

VIII. COMPETENCE OF TRIAL COUNSEL

As we indicated early in this Opinion, interlaced with some of the complaints made by Ms. Craig is the assertion that, by reason of various acts or omissions in the pretrial and trial proceedings, trial counsel provided less than the minimum required level of competence, and that, as a result, she was denied the effective assistance of counsel. Her complaint in this regard centers principally on counsel's failure to obtain Ms. Burke's therapy notes and certain other material found in the files of the sexual assault center and the police and social services departments and his failure to make a proper motion to dismiss the indictment.

Although ordinarily this issue is reserved for postconviction proceedings rather than for direct appeal, here the issue was fully tried in the hearings on Ms. Craig's motions for new trial. Trial counsel testified at great length; he was asked about nearly every facet of his approach to the case, his preparation, and his trial tactics. At the conclusion of those hearings, the judge observed that, unlike the normal postconviction setting where counsel's conduct is examined based on "some sterile transcript," he had presided at both the pre-trial and trial proceedings. With that, he declined to find counsel incompetent "as a matter of law" or that Ms. Craig "was denied a fair trial as a result of [counsel's] participation in this case." More particularly, as we previously noted, the court concluded that the mass of "newly discovered" evidence would probably not have affected the outcome of the case. The court had earlier indicated that, had it considered a motion to dismiss the indictment, it would have denied the motion.

The standard to be used in assessing the performance of counsel is that enunciated in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984): "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." In selecting that standard and rejecting others suggested to it, the Court observed, at 693, 104 S.Ct. 2067:

> "Even if a defendant shows that particular errors of counsel were unreasonable . . . , the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."

Upon the record as a whole, we are unable to conclude that the trial court's assessment of counsel's performance in the light of the *Strickland* standard was incorrect. As we indicated in Part I, the "newly discovered" material presented at the post-trial hearings would not likely have changed the ultimate verdicts rendered by the jury. As to pressing a proper motion to dismiss the indictment, we observe that (1) counsel did obtain a good bit of detailed information as to the acts allegedly committed by Ms. Craig through the discovery process, (2) under the caselaw prevailing at the time, it is not at all clear that the broad time period alleged made the indictment defective, and (3) to the extent the court might have found fault with the indictment, the State would probably have been in a position to correct the fault. No claim has been made of any actual prejudice, i.e., of any inability to respond to the charges based on the evidence presented at trial.

JUDGMENTS AFFIRMED; APPELLANT TO PAY THE COSTS.

APPENDIX C

PROVISIONS ALLOWING FOR USE OF ONE-WAY CLOSED-CIRCUIT TELEVISION, ONE-WAY SCREENS, OR ONE-WAY MIRRORS

Alabama: Ala. Code § 15-25-3 (Supp. 1988).

Alaska: Alaska Stat. § 12.45.046 (Supp. 1988).

Arizona: Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988).

Connecticut: Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989).

Florida: Fla. Stat. § 92.54 (West Supp. 1989).

Georgia: Ga. Code Ann. § 17-8-55 (Supp. 1989).

Illinois: Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989).

Indiana: Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989).

Iowa: Iowa Code Ann. § 910A.14 (West Supp. 1989).

Kansas: Kan. Stat. Ann. § 22-3434 (1988).

Kentucky: Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989).

Louisiana: La. Rev. Stat. Ann. § 15:283 (West Supp. 1989).

Maryland: Md. Cts. & Jud. Proc. Code Ann. § 9-102 (Supp. 1988).

Massachusetts: Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989).

Minnesota: Minn. Stat. Ann. § 595.02 (West 1988).

New Jersey: N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989).

Oklahoma: Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989).

Pennsylvania: Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989).

Rhode Island: R.I. Gen. Laws § 11-37-13.1 (Supp. 1988).

Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989).

Utah: Utah Code Ann. § 77-35-15.5 (Supp. 1989).

Vermont: Vt. R. Evid. 807.

PROVISIONS ALLOWING FOR USE OF TWO-WAY CLOSED-CIRCUIT TELEVISION

California: Cal. Penal Code § 1347 (West Supp. 1989).

Hawaii: Haw. R Evid. 616

New York: N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989)

Ohio: Ohio Rev. Code Ann. § 2907.41 (Page 1987).

Vermont: Vt. R. Evid. 807.

PROVISIONS ALLOWING FOR PRESERVATION OF TESTIMONY ON VIDEOTAPE

Alabama: Ala. Code § 15-25-2 (Supp. 1988).

Arizona: Ariz. Rev. Stat. Ann. § 13-4253 (1985).

Arkansas: Ark. Code Ann. § 16-44-203 (1987).

California: Cal. Penal Code § 1346 (West Supp. 1989).

Colorado: Colo. Rev. Stat. § 18-3-413 (1986).

Connecticut: Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989).

Delaware: Del. Code Ann. tit. 11, § 3511 (1987).

Florida: Fla. Stat. § 92.53 (West Supp. 1989).

Hawaii: Haw. R. Evid. 616.

Illinois: Ill. Ann. Stat. ch. 38, para. 106A-2 (Smith-Hurd Supp. 1989).

Indiana: Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989).

Iowa: Iowa Code Ann. § 910A.14 (West Supp. 1989).

Kansas: Kan. Stat. Ann. § 22-3434 (1988).

Kentucky: Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989).

Massachusetts: Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989).

Minnesota: Minn. Stat. Ann. § 595.02 (West 1988).

Missouri: Mo. Ann. Stat. §§ 491.680-.687 (Vernon Supp. 1989).

Montana: Mont. Code Ann. §§ 46-15-401 to -403 (1987).

Nevada: Nev. Rev. Stat. Ann. §§ 174.227 & 174.229 (Michie 1986).

New Hampshire: N.H. Rev. Stat. Ann. § 517.13-a (Supp. 1988).

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Ohio: Ohio Rev. Code Ann. § 2907.41 (Page 1987).

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Pennsylvania: Pa. Cons. Stat. Ann. tit. 42, § 5984 (Purdon Supp. 1989).

Rhode Island: R.I. Gen. Laws § 11-37-13.1 (Supp. 1988).

South Dakota: S.D. Codified Laws Ann. § 23A-12-9 (1988).

Tennessee: Tenn. Code Ann. § 24-7-116 (Supp. 1988).

Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989).

Utah: Utah Code Ann. § 77-35-15.5 (Supp. 1989).

Vermont: Vt. R. Evid. 807.

Wisconsin: Wis. Stat. § 967.04(7) (Supp. 1988).

PROVISIONS ALLOWING FOR USE OF A CHILD'S HEARSAY STATEMENTS

Alaska: Alaska Stat. § 12.40.110 (Supp. 1988).

Arizona: Ariz. Rev. Stat. Ann. § 13-1416 (Supp. 1988).

Arkansas: Ark. R. Evid. 803(25)(A).

California: Cal. Evid. Code § 1228 (West Supp. 1989).

Colorado: Colo. Rev. Stat. § 13-25-129 (1987).

Florida: Fla. Stat. § 90.803(23) (West Supp. 1989).

Illinois: Ill. Ann. Stat. ch. 38, para. 115-10 (Smith-Hurd Supp. 1989).

Indiana: Ind. Code Ann. § 35-37-4-6 (Burns Supp. 1989).

Iowa: Iowa Code Ann. § 232.96(6) (1985).

Kansas: Kan. Stat. Ann. § 60-460(dd) (1983 & Supp. 1988).

Kentucky: Ky. Rev. Stat. Ann. § 421.355 (Baldwin Supp. 1989).

Maine: Me. Rev. Stat. Ann. tit. 15, § 1205 (Supp. 1988).

Maryland: Md. Cts. & Jud. Proc. Code Ann. § 9-103.1 (Supp. 1988).

Minnesota: Minn. Stat. Ann. § 595.02(3) (West 1988).

Missouri: Mo. Rev. Stat. § 491.075 (Vernon Supp. 1989).

Oklahoma: Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1989).

Rhode Island: R.I. Gen. Laws § 14-1-69 (Supp. 1988).

South Dakota: S.D. Codified Laws Ann. § 19-16-38 (1987).

Texas: Tex. Crim. Proc. Code Ann. § 38.072 (Vernon Supp. 1989).

Utah: Utah Code Ann. § 76-5-411 (Supp. 1989).

Vermont: Vt. R. Evid. 804a.

Washington: Wash. Rev. Code Ann. § 9A.44.120 (1988).

No. 89-478

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND

Petitioner,

v.

SANDRA ANN CRAIG

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Question Presented

THE MARYLAND COURT OF APPEALS OF MARYLAND DECIDED *CRAIG V. MARYLAND* SOLELY ON STATE GROUND PRECLUDING *CERTIORARI* REVIEW.

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Petitioner,

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Respondent, by her attorneys Maria Cristina Gutierrez, William H. Murphy, Jr., Gary S. Bernstein and Frederick P. Charleston, request that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be denied.

STATEMENT OF THE CASE

The basic facts are set forth in the Petition for Writ of Certiorari to the Court of Appeals filed by the Petitioner, State of Maryland, and in the opinions of the Court of Appeals and Court of Special Appeals included in the appendix to the Petition.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS OF MARYLAND DECIDED *CRAIG v. MARYLAND* SOLELY ON STATE GROUNDS PRECLUDING CERTIORARI REVIEW.

This Court has expressly held that it will not undertake to review a state court decision which indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate and independent grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). For state courts must be left free and unfettered in interpreting their state constitutions and laws. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

The Court of Appeals of Maryland's decision in *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989) rests separately adequately and independently on state grounds. *Craig* held solely as a matter of state law that the Maryland Annotated Code, Courts and Judicial Proceedings Article 1, §9-102 (hereinafter cited as CJP §9-102) required that the trial judge personally observe and examine the child witness and make a case-specific finding of necessity before utilizing the less than full confrontation procedures authorized under the statute. That the Court of Appeals decided this case exclusively on state grounds is abundantly clear from its holding.

Petitioner urges this Court to overrule the Court of Appeals of Maryland on the specious ground that the reversal of Mrs. Craig's conviction is based on a misinterpretation of *Coy v. Iowa*, 487 U.S.___, 108 S.Ct. 2798 (1989). The fallacy of Petitioner's argument is demonstrated by careful review of the history and facts of this case. CJP §9-102, was first reviewed by the Court of Appeals in *Wildermuth v. State* 310 Md. 496, 530 A.2d 275 (1987) which upheld the facial constitutionality of the statute in the face of a similar confrontational attack.

Wildermuth delineated guidelines for trial judges in establishing the quantum of evidence required before CJP §9-102 could be invoked and held that, *inter alia*, ordinarily a trial judge should examine, and observe a child witness before utilizing CJP §9-102. Mrs. Craig was convicted on the testimony of four children who were permitted over her objections to testify from the judge's chambers, out of Mrs. Craig's physical presence, on one-way closed-circuit television which permitted Mrs. Craig to see each child but prevented the children from seeing Mrs. Craig. This procedure was invoked under CJP §9-102.

Mrs. Craig challenged her conviction on numerous grounds including a three-pronged attack on CJP §9-102. First, she argued that CJP §9-102 violated the Sixth Amendment by preventing an accused from subjecting an untruthful child to "serious emotional distress" which would render the child "unable to reasonably communicate" a false accusation. Second, she argued that because CJP §9-102 eliminated the right to face-to-face confrontation altogether it violated the Sixth Amendment. Third, she argued that because *Wildermuth* requires a trial judge to personally examine each of the children and observe their behavior before invoking CJP §9-102 and because the trial judge did not do so in her case, her conviction should be reversed because the trial judge violated CJP §9-102 as interpreted by *Wildermuth*.

Petitioner conveniently omits from its argument the fact that the Court of Appeals of Maryland expressly rejected[1] Mrs. Craig's constitutional attacks on CJP §9-102. It reversed her conviction because the trial judge failed to question each child or observe their behavior on the witness stand before invoking the

[1] Before rejecting Mrs. Craig's constitutional attack, the Court of Appeals meticulously digested *Coy* both through the majority opinions view that the Sixth Amendment right of confrontation *ordinarily* demands a face-to-face encounter between accused and accuser and then through Justice O'Connor's concurring view that the right was not absolute but "rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony" *Coy* 487 U.S. at ____, 108 S.Ct. at 2803. The Court found nothing in *Coy* to cause it to reevaluate *Wildermuth's* finding that CJP §9-102 was constitutional under state law.

CJP §9-102 procedures which took away all of Mrs. Craig's confrontation rights. The entire holding of the Court of Appeals is as follows:

> "The steps taken in the trial court, in this case, to invoke the protection of §9-102 did not comply with the requirements we have set forth in Part III of this opinion. Four children testified via one-way closed-circuit television. Their ages ranged from four to seven. Two were girls and two were boys. When the trial judge made his §9-102 determination, the finding that authorized the use of closed-circuit television, he had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television.
>
> In the absence of judicial observation of the witnesses and careful exploration of alternatives to full confrontation, beginning with those least restrictive of the right, the testimony before the court was insufficient to support the use of §9-102. The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said what 'would cause him the most anxiety would be to testify in front of Mrs. Craig . . . .' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'
>
> We need not debate whether under some circumstances this sort of evidence might help to support a finding that a child, if he or she testified in the defendant's presence, would suffer 'serious emotional distress such that the child cannot reasonably communicate.' We do point out that in Wildermuth, we said that 'testimony about the likely impact on the particular child must be specific and must show more than mere nervousness or excitement or some reluctance to testify.' 310 Md. at 514, 530 A.2d at 289. Even more critical, 'there must be 'a particularized examination of all the circumstances concerning the impact of public testimony in the presence of the defendant upon the emotional health of the child.' ' Id. at 525, 530 A.2d at 289 (quoting People v. Algarin, 129 Misc. 2d 1016, 1024, 498 N.Y.S.2d 977, 983 (N.Y. Sup. Ct. 1986)) [emphasis supplied].
>
> The difficulty here is that the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses. For example, as to one witness, the expert thought the child 'coming into the courtroom where she would be faced with the alleged perpetrator and a courtroom of strangers would be unable to talk about what happened to her.' [Emphasis

supplied]. As to another: 'he would have great difficulty in talking in front of people, particularly in front of Mrs. Craig . . . . ' [Emphasis supplied]. With respect to the third child, this dialogue occurred:

> Q. What do you think the reaction of Jessie . . . would be if brought into the courtroom to testify?
>
> A. I [think] that she would probably -- Jessie would probably look around and become extremely timid and unwilling to talk. [Emphasis supplied].

When the constitutional right of confrontation is at issue, we repeat, the necessity that may be invoked to diminish that right, through procedures such as those permitted by §9-102, must be related to testimony in the defendant's presence: It is not enough, for this purpose, that trauma or inability to testify be produced by testifying in the courtroom or in front of people. There may be other ways of dealing with that sort of problem, see note 9, supra, but limitation of the right of confrontation is not one of them.

Whether the trial judge might have narrowed the generality of this testimony, had he questioned the potential witnesses, we cannot tell. He did not question them: he did not have before him out declaration 'personal observation [and inquire] by the judge . . . should be the rule rather than the exception.' Wildermuth, 310 Md. at 523-524, 530 A.2d at 289.

Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his §9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children in a courtroom will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate.' He failed to find -- indeed, on the evidence before him, could not have found -- that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of §9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of §9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Craig*, 560 A.2d at 111.

As its holding makes clear, the Court of Appeals analyzed *Coy* only to refute Mrs. Craig's contention that CJP §9-102 was unconstitutional, which neither the Petitioner nor Mrs. Craig now contest because her convictions were nonetheless reversed on state law grounds, and only to establish the proposition that before invoking CJP §9-102 the trial judge was obliged under the Sixth Amendment to carefully explore "alternatives to full confrontation, beginning with those least restrictive of the right before denying Mrs. Craig her

right to see and be seen by the child. Although that analysis was correct, it was not essential to the court's finding that the trial judge failed to comply with *Wildermuth's* predicate requirements for invocation of CJP §9-102.

Indeed, that part of the opinion was dictum, written to guide Maryland trial judges when asked by the state to abridge an accused's Sixth Amendment right to see and be seen by a child witness every time invocation of CJP §9-102's protective procedures are sought. The court made it clear that when each such request is made, a trial judge must be sensitive to confrontation clause requirements in fashioning alternatives to full confrontational rights. The Court of Appeals said that where a finding is made that a child witness is unable to reasonable communicate because of serious emotional distress produced by the *presence* of the defendant then:

> ". . . appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Section 9-102, read in the light of Coy, cannot be the exclusive means of witness protection. It is, rather the ultimate -- the farthest a court can go in that direction, Thus, for example, if a child witness will not suffer 'severe emotional distress' when testifying via two-way television in a room separate from the courtroom, so that the accused is visible to the witness as well as vice versa, that procedure should be followed." *Craig*, 560 A.2d at 1128.

The Court of Appeals has thus instructed trial judges to invoke CJP §9-102 only when necessary, hardly a proposition which should interest this Court.

Because Mrs. Craig's conviction was reversed only because the trial judge failed to meet this standard before invoking CJP §9-102; because this was purely a state law question; because *Coy* was analyzed by the Court of Appeals only to reject Mrs. Craig's constitutional attack; and because Mrs. Craig in light of the reversal of her conviction is not now pressing such an attack, the Petition for *Certiorari* should be denied.

Petitioner's real complaint here is that, as a matter of state law, the Court of Appeals of Maryland in reaffirming its prior decision in *Wildermuth* has continued to require that the protections of the statute "cannot be invoked

unless the child witness initially is questioned . . . *in the defendant's presence*." *Craig*, 560 A.2d at 1127. However, because this is a requirement of state law and not the Court of Appeals' interpretation of what *Coy* requires, and because the relief sought is specious, Petitioner must address its complaint to the legislature of Maryland and not to this Court. This Court should not permit the use of a subterfuge of constitutional argument to persuade this Court to overturn a non-constitutional interpretation of Maryland law. Petitioner disingenuously tries to convert this into a constitutional issue[2] where none exists because it recognizes that this Court may be looking for a vehicle to answer questions left open in *Coy*. The only constitutional issues raised here were those raised by Mrs. Craig and squarely rejected.

Given that Petitioner is not asking this Court to declare CJP §9-102 unconstitutional or to limit a state court's power to require a trial judges to make case-specific findings and to personally observe and examine child witnesses before allowing a child protective state statute to be utilized, review by this Court is not only unwarranted, it is immaterial. If *certiorari* were granted and this Court disagreed with the Court of Appeals, this Court could decide only that *Coy* rendered CJP §9-102 unconstitutional. And because this Court could not overturn the Court of Appeals finding that Mrs. Craig's trial judge violated CJP §9-102 by failing to personally examine and observe child witness or that the state violated CJP §9-102 by its failure to produce adequate expert testimony, it is immaterial whether this Court agrees concerning that standard.

---

[2] Petitioner speciously argues review by this Court is necessary because *Craig* conflicts with *Kentucky v. Stincer*, 482 U.S. 730 (1987). Petitioner of course fails to note that *Stincer* was decided on cross-examination grounds; that the *Stincer* witnesses actually testified live in the defendant's presence at trial and were re-examined on the competency issues; and, that the authors of the sharply worded dissent on face-to-face confrontational grounds have since landed squarely in the *Coy* majority.

Petitioner also cites state court post-*Coy* decisions most of which, like *Craig*, analyzed *Coy* in light of a defendant's constitutional attack on child protective procedures previously upheld as constitutional and, like *Craig* , reaffirmed that constitutionality on state grounds. Interestingly, many states reversed like *Craig* convictions for a failure to meet the state required standard.

Not withstanding Petitioner's hysteria[3] there is nothing to warrant this Court's review. All the Court of Appeals of Maryland did was to say you can take away only as much of a defendant's confrontational rights as is absolutely necessary to enable child witnesses to testify. This result, although decided exclusively on state grounds, is also clearly consistent with *Coy*.[4]

CONCLUSION

Nothing in the Petitioner's argument makes *Craig* worthy of this Court's review. The Court of Appeals of Maryland solely as a matter of state law reversed Mrs. Craig's conviction because the procedures the Court deemed valid to the requisite use of CJP §9-102 were not followed in her case; because the judge did not personally examine and observe the child witnesses demeanor; because the judge did not explore other less confrontationally intrusive means to protect the child witnesses; and because the expert testimony was inadequate to meet the quantum and quality of evidence required under CJP §9-102 and under *Wildermuth*.

A grant of *Certiorari* cannot and will not alter the result below. CJP §9-102 and *Wildermuth* was Maryland law before *Coy*. CJP §9-102, *Wildermuth* and *Craig* are still Maryland law in light of *Coy*. The Petition should be denied.

---

[3] *Craig*, far from heralding any retreat from the nationwide move to consider and implement varying protective measures for child witnesses, rather, ensures that the least obstructive measure will be utilized whenever anything less that absolute face-to-face confrontation is employed in a presumptively innocent defendant's criminal trial and approves directly the use of a variety of protective procedures designed to shield a child witness from the impact of testifying in a defendant's presence including both one-way and two-way simultaneously broadcasted closed-circuit television. *Craig* also noted the already existent availability of procedures easily employable to protect a child witness traumatized not by the presence of the defendant but by the sometimes frightening spector of public testimony in a public courtroom.

[4] In no way conceding her already rejected constitutional attack Respondent notes that Petitioner urges review in order "to keep balance true" and loftily quotes Justice Cardoza. Respondent's rights as a presumed innocent accused to subject her accusers to the maximum degree of constitutionally permissible trauma which face-to-face confrontation necessarily entails cannot be compared to the "*gossamer possibilities of prejudice*" created by the exclusion of an accused's physical presence at a jury "view" of a crime scene to which Justice Cardoza refers, writing prior to recognition by this Court of many of the fundamental due process rights we now hold dear in *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *Craig* carefully strikes the balance and keeps that balance true.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 1989, three copies of the foregoing Motion for Leave to Proceed *In Forma Pauperis*, Affidavit in Support Thereof, and Brief in Opposition to the Petition for Writ of Certiorari to the Court of Appeals of Maryland were hand-delivered to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, 7 North Calvert Street, Baltimore, Maryland 21202.

Maria Cristina Gutierrez

MOTION FILED
OCT 23 1989

No. 89-478

(3)

IN THE

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STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION, AND THE STATE OF ALASKA, OFFICE OF PUBLIC ADVOCACY, IN SUPPORT OF PETITIONER TOGETHER WITH BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION, AND THE STATE OF ALASKA, OFFICE OF PUBLIC ADVOCACY, IN SUPPORT OF PETITIONER

The National Association of Counsel for Children (NACC), the National Court Appointed Special Advocate Association (NCASAA), and the State of Alaska, Office of Public Advocacy (OPA), hereby respectfully move this court for leave to file a brief in this case as *amicus curiae* in support of Petitioner. The consent of the attorneys for Petitioner has been

obtained for the filing of a brief *amicus curiae* by the NACC, NCASAA and OPA. The consent of the attorneys for the Respondent was requested by counsel for the *amici curiae* but was refused.

The NACC is a voluntary, national membership organization concerned with the rights and interests of children who are the subjects of child protective, matrimonial and custody litigation. Established in 1977, the association has over 1,100 members in 50 states. The NCASAA is a nonprofit membership organization which advocates for the best interests of abused and neglected children, and supports the development and use of programs which recruit and train volunteers to serve as advocates for children in juvenile dependency proceedings. The OPA is the state agency which the Alaska State Legislature has designated to provide representation for abused and neglected children in juvenile proceedings and to represent children in contested custody and adoption proceedings.

The interests of these organizations goes beyond their general concern for the legal rights of children. The majority of the membership of these organizations is involved in representing children before courts in virtually every jurisdiction in the United States of America. Hence, the outcome of this case will have a tangible impact on the work and professional practice of the members of these organizations. The issues presented in this case are of national importance and are of deep concern to these organizations. Because NACC, NCASAA and OPA believe the case below was incorrectly decided, and because the case involves important questions which affect the legal rights of children, the NACC, NCASAA and OPA wish to join Petitioner in urging this court to grant a writ of

certiorari and review this case on the merits. Consequently, the NACC, NCASAA and OPA respectfully request this court grant leave to file our brief as *amicus curiae* in the form submitted with this motion.

Respectfully submitted,

/s/ Philip J. McCarthy, Jr.

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October 23, 1989

QUESTIONS PRESENTED

1. If the trial court has made individualized findings that a child witness would suffer severe emotional distress such that the child witness cannot reasonably communicate, is it constitutionally permissible to utilize at trial procedures which protect the child from face-to-face confrontation with the defendant?

2. Does the Sixth Amendment's Confrontation Clause require that a child witness initially be questioned in the defendant's presence prior to the trial court making individualized findings that protection of the child witness from face-to-face confrontation with the defendant is necessary at trial?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

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BRIEF OF NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION, AND THE STATE OF ALASKA, OFFICE OF PUBLIC ADVOCACY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief, and Respondent has refused such consent. A motion for leave to file this brief has been filed.

INTEREST OF THE AMICUS

The National Association of Counsel for Children (NACC) is a voluntary, national membership organi-

zation concerned with the rights and interests of children who are the subject of child protective, matrimonial, and custody litigation. Established in 1977, the association has over 1,100 members in 50 states. Membership is predominately lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, "The Guardian".

The National Court Appointed Special Advocate Association (NCASAA) is a nonprofit member organization which advocates for the best interest of abused and neglected children, and supports the development, growth and continuation of programs which recruit and train volunteers to serve as advocates for children in juvenile dependency proceedings. Presently there are 377 court appointed special advocate (CASA) programs in 47 states in this country. The CASA concept has been endorsed by the National Council of Juvenile and Family Court Judges, the American Bar Association, the United States Department of Justice, and many other private and public organizations.

The State of Alaska, Office of Public Advocacy (OPA), is the state agency which has been designated by the Alaska State Legislature to provide legal representation for children as counsel and/or guardian ad litem in child abuse and neglect cases, child custody proceedings, and in criminal matters regarding the protection of child witnesses.

The interest of NACC, NCASAA and OPA goes beyond a generalized concern over the legal rights of

children. The members of NACC, NCASAA and OPA are involved in representing children throughout our country. Because we believe the case below was wrongly decided, and because it involves important questions of law which have not been, but should be, settled by this court, and because the interests of children are directly and adversely affected by this decision, we join the Petitioner in urging the Court to grant a writ of certiorari and review this case on the merits.

ARGUMENT

I. THE PROTECTION OF CHILD WITNESSES FROM FURTHER TRAUMA IS AN IMPORTANT STATE INTEREST WHICH JUSTIFIES, IN APPROPRIATE SITUATIONS, SOMETHING LESS THAN FACE-TO-FACE CONFRONTATION OF THE CHILD WITNESS BY THE DEFENDANT

This case presents an important issue which has not been resolved by this court's prior decision of *Coy v. Iowa*, 487 U.S. ___ , 108 S.Ct. 2798 (1988). Namely, is it constitutionally permissible to protect child witnesses from face-to-face confrontation with the defendant when there has been an individualized finding that testifying under the usual courtroom conditions would traumatize the child?

The problem of child abuse in our society is one of epidemic proportion. From 1976 until 1985, annual reports of child maltreatment increased dramatically, increasing nearly threefold from 669,000 to over 1.9 million. The American Association for Protecting Children, "Highlights of Official Child Neglect and Abuse Reporting, 1985", 3 (1987). Based upon data collected from 41 states and the District of Columbia, over 2.2

million reports of child abuse and neglect were filed in 1988. National Committee for Prevention of Child Abuse, "Child Abuse Fatalities Continue to Rise: The Results of the 1988 Annual Fifty-State Survey", 3 (1989). Besides the well-publicized revelation that physical and sexual abuse has increased, what is most shocking is that the number of child abuse fatalities continues to increase. Since 1985, the number of child abuse fatalities has increased over 36% with a minimum of three children a day being reported as fatal victims of child abuse. Id. at page 15.

While the number of children abused nationally has continued to rise, prosecution of the perpetrators of child abuse lags far behind. As this court has recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). In response to this national epidemic, 26 states had enacted child witness protection laws approving the use of closed circuit television, and 34 states had enacted laws approving videotaping of a child's testimony, by the end of 1988. (*See* Appendix A.)

In the *Coy* decision, this court found an Iowa statute which authorized placement of a screen between the defendant and a child victim/witness at trial to be unconstitutional because the procedure was not supported by individualized findings but rather a legislatively imposed presumption of trauma to the child witness having face-to-face confrontation with the accused at trial. *Id.* at 2803. Since *Coy* was decided, state appellate courts have been divided in their interpretation of *Coy* regarding the constitutionality of child witness protection statutes and the appropriate

standard for determining individualized findings which constitutionally justify procedures to protect the child witness from face-to-face confrontation with the defendant at trial. The overwhelming majority of state court decisions since *Coy* have interpreted *Coy* to allow protection of the child witness, in appropriate situations, from face-to-face confrontation with the defendant at trial.[1]

While the majority of state appellate courts have upheld the constitutionality of child witness protection statutes, a minority of states have ruled otherwise. The Massachusetts Supreme Court has incorrectly determined that a Massachusetts statute allowing a child witness to testify through electronic means, outside the physical presence of the defendant, violates the defendant's constitutional right of confrontation. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 374-375 (Mass. 1988). The West Virginia Supreme Court has

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[1] *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (Ariz. 1989) (en banc); *State v. Hoversten*, 437 N.W.2d 240 (Iowa 1989); *In the Interest of J.D.S.*, 436 N.W.2d 349 (Iowa 1989); *People v. Thomas*, 770 P.2d 1325 (Colo. Ct. App. 1988), (cert. granted by Colo. Sup. Ct. on March 13, 1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277 (Conn. 1989), cert. denied, 109 S.Ct. 2103 (1989); *State v. Snook*, 210 Conn. 244, 555 A.2d 390 (Conn. 1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1988), cert. denied, 109 S.Ct. 3219 (1989); *Brady v. State*, 540 N.E.2d 59 (Ind. Ct. App. 1989); *State v. Eaton*, 244 Kan. 370, 769 P.2d 1157 (Kan. 1989); *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989); *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35 (N.J. Super. A.D. 1989); *State v. Davis*, 229 N.J. Super. 66, 550 A.2d 1241 (N.J. Super. A.D. 1988); *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (N.M. App. 1988), cert. denied, 109 S.Ct. 1572 (1989); *Commonwealth v. Groff*, 548 A.2d 1237 (Pa. Super. 1988); *State v. Taylor*, 562 A.2d 445 (R.I. 1989); *State v. Thomas*, 150 Wis.2d 374, 442 N.W.2d 10 (1989).

also incorrectly concluded that the defendant's right of confrontation is violated when the child witness testifies at trial and the defendant is denied the opportunity of face-to-face confrontation. *State v. Murray*, 375 S.E.2d 405, 412 (W.Va. 1988).

The Louisiana Supreme Court has determined its child witness protection statute to be unconstitutional because of its nonspecific standard of "when justice so requires", which it determined to be a generalized legislative finding similar to the Iowa statute found to be unconstitutional by this court in *Coy*. While the Louisiana Supreme Court has found unconstitutional this section of the Louisiana statute, La. R.S. 15:283, it has failed to provide guidance to its legislature as to what is the acceptable constitutional standard it believes necessary in light of the *Coy* decision. *State v. Murphy*, 542 So.2d 1373, 1376 (La. 1989).

In the aftermath of the *Coy* decision, guidance from this court is necessary to insure that state legislatures draft constitutionally permissible statutes, and to further insure that state appellate courts are informed such laws are constitutionally permissible. In *Coy*, this court did not specifically address whether protection of child witnesses is a constitutionally permissible exception which justifies something less than face-to-face confrontation of a child witness by the defendant. Justice Scalia's opinion concluded: "We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. . . . Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most

literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence'." *Id.* at 2803, quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987). We respectfully urge this court to make this case the long-awaited "day" when this court clarifies for the states, once and for all, that protection of child witnesses is an important public policy which, in appropriate situations, justifies less than face-to-face confrontation with the defendant at trial.

II. THE CRAIG DECISION HAS INCORRECTLY INTERPRETED DECISIONS OF THIS COURT BY REQUIRING THAT BEFORE PROTECTION OF THE CHILD WITNESS FROM FACE-TO-FACE CONFRONTATION WITH THE DEFENDANT AT TRIAL IS CONSTITUTIONALLY PERMISSIBLE, A CHILD WITNESS MUST SUFFER SEVERE EMOTIONAL DISTRESS WHEN INITIALLY QUESTIONED IN THE DEFENDANT'S PRESENCE

This case involves a Maryland statute authorizing the use of closed circuit television for presentation of a child witness' testimony. The procedure authorized by the Maryland statute is significantly different from the Iowa statute reviewed in this court's *Coy* decision. The Iowa statute had a legislatively imposed presumption of trauma to the child witness. The Maryland statute requires that "the judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate".[2] In the instant case, the trial court made particularized findings that the child witnesses would suffer serious

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[2] Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102(a)(1)(ii) (Supp. 1988).

emotional distress such that they could not reasonably communicate. *Craig v. State*, 560 A.2d 1120, 1122 (Md. 1989).

The Maryland Court of Appeals rejected the individualized findings of the trial court and determined that Maryland's statutory phrase "testimony by the child victim in the courtroom" must be interpreted in light of *Coy* to mean that the child's inability to testify is related to being in the presence of the accused rather than the inability of the child to testify in the ordinary courtroom setting. *Id.* at 1126. Maryland's highest court interpreted *Coy* to require that " . . . the operative 'severe emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus we construe the phrase 'in the courtroom' as meaning, for Sixth Amendment and Article 21 confrontation purposes, 'in the courtroom in the presence of the defendant'." *Id.* at 1127. Based upon this statutory interpretation, the Maryland high court went on to require, as the appropriate procedure for determining whether or not protection of a child witness is permissible, that " . . . in the face of a constitutional challenge, Sec. 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence, and is found by the judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." *Id.* at 1127. In essence, this decision has interpreted *Coy* illogically to mandate that a child must actually suffer court imposed trauma in the presence of the defendant before protective measures can be implemented. The same misguided reasoning and result has been imposed by the Supreme Court of Rhode Island. *State v. Taylor*, 562 A.2d 445 (R.I. 1989). Thus, the decision of the Maryland Court of Appeals has mandated a procedure which defeats the important public policy considerations of the Maryland statute, i.e., protection of the child witness from trauma.

Maryland's high court interpreted *Coy* in a manner which conflicts with this court's decision of *Kentucky v. Stincer*, 482 U.S. 730 (1987). The *Stincer* decision held that a defendant's constitutional right of confrontation was not violated when the defendant was excluded from a hearing to determine a child witness' competency. The Maryland decision fails to recognize that a hearing to determine the necessity of protecting a child witness is parallel to, and indeed an extension of, a competency hearing. Like the competency hearing at issue in *Stincer*, a hearing to determine the necessity to protect a child witness does not involve questions about the substance of the witness' testimony, but involves collateral issues, i.e., the child's ability to testify. *See id.* at 740-741. A decision as to whether or not to utilize protective measures is one which is made by the judge and not by the jury. *See id.* at 742. The *Craig* decision thus, while finding it constitutionally permissible to protect child witnesses, has interpreted *Coy* and *Stincer* incorrectly and illogically.

III. CONFLICTING STATE STANDARDS FOR DETERMINING WHEN TO IMPLEMENT PROCEDURES TO PROTECT CHILD WITNESSES

The critical factors required under the Maryland statute are: (a) the child must be a victim, (b) the

trauma the child would experience must be due to the child's testifying in a courtroom setting, and this experience would result in (c) serious emotional distress, and (d) that the emotional distress would result in the child not being able to reasonably communicate.[3] The requirements of the Maryland statute differ greatly from those imposed by other states. A review of state statutes providing for protection of child witnesses reveals that the standards articulated by the numerous state statutes are widely diverse and desperately in need of clarification and guidance from this court.

One factor required by the Maryland statute is that the child witness be the victim of abuse, Sec. 9-102(a)(1). Other states have passed laws which provide for protection of children who are not victims of abuse but are witnesses.[4] The distinction between these two classes of child witnesses may be of constitutional importance if confrontation between the child and defendant is the critical factor in assessing trauma to the child versus trauma to the child based on the totality of circumstances.

This case also presents the court the opportunity to address the degree of emotional distress a child need suffer before it is constitutionally permissible to invoke child witness protection measures. Maryland and at least five other states require a finding of

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[3] *Ibid.*

[4] Alaska Stat. Sec. 12.45.046 (Supp. 1988); Ariz. Rev. Stat. Ann. Sec. 13-4251 (Supp. 1988); Del. Code Ann. tit. 11 Sec. 3511 (1987); Iowa Code Ann. Sec. 910 A.14 (West Supp. 1989); Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989); Mass. Gen. Laws Ann. ch. 278 Sec. 16D (West Supp. 1989).

"severe" or "serious" emotional or mental distress to the child witness before protection of a child witness can be implemented[5] Other states require a finding by the court of emotional trauma to the child but a lesser degree than that of "serious" emotional or mental distress.[6] Florida, for example, requires only a finding that a child will suffer "moderate emotional or mental harm if required to testify in open court". *Glendening v. State*, 536 So.2d 212, 218 (Fla. 1988). Maryland and a minority of states also require that in addition to the child witness experiencing trauma, the trauma must result in the inability of the child to communicate.[7]

Further disagreement exists among the states over the proper evidentiary standard for determining child witness protection requests. The majority of states with child witness protection laws have

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[5] *Maryland*: Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102(a) (Supp. 1988); *Georgia*: Ga. Code Ann. Sec. 81-1006.2 (Supp. 1989); *New Jersey*: N.J. Stat. Ann. Sec. 2A:84A-32.4 (West Supp. 1989); *New York*: N.Y. Crim. Proc. Law Secs. 65.00-.30 (McKinney Supp. 1989); *Ohio*: Ohio Rev. Code Ann. Sec. 2907.41 (1987); *Utah*: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989).

[6] e.g., *Florida*: Fla. Stat. Ann. Sec. 92.53 (West Supp. 1989); *Indiana*: Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989); *Kentucky*: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989); *Missouri*: Mo. Ann. Stat. Sec. 491.680(2) (Vernon Supp. 1989); *New Hampshire*: N.H. Rev. Stat. Ann. Sec. 517:13-a (Supp. 1988); *Wisconsin*: Wis. Stat. Sec. 967.04(7)(a) (Supp. 1988).

[7] *Alaska*: Alaska Stat. Sec. 12.45.046(a) (Supp. 1988); *Arizona*: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988); *Maryland*: Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102 (Supp. 1988); *Ohio*: Ohio Rev. Code Ann. Sec. 2907.41 (1987); *Connecticut*: Conn. Gen. Stat. Ann. Sec. 54-869 (West Supp. 1989); *Kansas*: Kan. Stat. Ann. Sec. 22-3434 (1988); *Vermont*: Vt. R. Evid. 807.

not addressed the evidentiary standard to be utilized by their courts for determining the need to protect the child witness. A few states have determined that the degree of trauma required to justify protection of a child witness be established by "clear and convincing" evidence.[8] At least one state, New Hampshire, employs the "preponderance of the evidence" standard, N.H. Rev. Stat. Ann. Sec. 517:13-a (Supp. 1988). At the other extreme, the Massachusetts Supreme Court has determined that to allow a child witness to testify outside the courtroom, but in the presence of the defendant, the state must show by proof "beyond a reasonable doubt" that it is necessary to avoid severe and long-lasting emotional trauma to the child. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 376 (Mass. 1988).

We respectfully urge this court to review the decision below for the reasons set forth herein and those advanced by the petitioner, and to consider the important and previously unresolved questions regarding protection of child witnesses.

CONCLUSION

Given the magnitude of child abuse in America and the trauma which child witnesses experience when called to testify, we urge this court to determine that it is indeed a compelling state interest, acting as parens patriae, to implement provisions for safeguarding the welfare of child witnesses. Society's sense of com-

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[8] *State v. Eaton*, 769 P.2d 1157, 1167-1168 (Kan. 1989); *State v. Taylor*, 562 A.2d 445,453 (R.I. 1989); *State v. Crandall*, 555 A.2d 35, 39 (N.J. Super. A.D. 1989); *State v. Bonello*, 554 A.2d 277, 284-285 (Conn. 1989).

passion tells us that we should do what we can to protect a child witness "from further victimization in a legal system which is committed to protecting human rights". *State v. Gilbert*, 326 N.W.2d 744, 746 (Wis. 1982). For these reasons, and those advanced by the petitioner, we respectfully request this court grant petitioner's request to issue a writ of certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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National Court Appointed Special
Advocates Association
As *Amicus curiae*

October 23, 1989

APPENDIX

APPENDIX A

PROVISIONS FOR USE OF CLOSED CIRCUIT TELEVISION, ONE-WAY SCREENS OR ONE-WAY MIRRORS

1. Alabama: Ala. Code Sec. 15-25-3 (Supp. 1988)
2. Alaska: Alaska Stat. Sec. 12.45.046 (Supp. 1988)
3. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
4. California: Cal. Penal Code Sec. 1347 (West Supp. 1989)
5. Connecticut: Conn. Gen. Stat. Sec. 54-869 (West Supp. 1989)
6. Florida: Fla. Stat. Ann. Sec. 92.54 (West Supp. 1989)
7. Georgia: Ga. Code Ann. Sec. 81-1006.2 (Supp. 1989)
8. Hawaii: Haw. R. Evid. 616
9. Indiana: Ind. Code Ann. Sec. 35-37-4-8 (Burns Supp. 1989)
10. Iowa: Iowa Code Ann. Sec. 910.14 (West Supp. 1989)
11. Kansas: Kan. Stat. Ann. Sec. 22-3434 (1988)
12. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
13. Louisiana: La. Rev. Stat. Ann. Sec. 15:283 (West Supp. 1989)
14. Maryland: Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102 (Supp. 1988)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278, Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)

17. Mississippi: Miss. Code Ann. Sec. 13-1-405 (Supp. 1987)
18. New Jersey: N.J. Rev. Stat. Sec. 2A:84A-32.4 (West Supp. 1989)
19. New York: N.Y. Crim. Proc. Law Secs. 65.00-.30 (McKinney Supp. 1989)
20. Ohio: Ohio Rev. Code Ann. Sec. 2907.41 (Supp. 1987)
21. Oklahoma: Okla. Stat. Ann. tit. 22 Sec. 753 (West Supp. 1989)
22. Pennsylvania: Pa. Cons. Stat. Ann. tit. 42 Sec. 5985 (Purdon Supp. 1989)
23. Rhode Island: R.I. Gen. Laws 11-37-13.1 (Supp. 1988)
24. Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989)
25. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
26. Vermont: Vt. R. Evid. 807

PROVISIONS FOR USE OF VIDEOTAPED TESTIMONY

1. Alabama: Ala. Code Sec. 15-25-2 (Supp. 1988)
2. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
3. Arkansas: Ark. Code Ann. Sec. 16-44-203 (1987)
4. California: Cal. Penal Code Sec. 1346 (West Supp. 1989)
5. Colorado: Colo. Rev. Stat. Sec. 18-3-413 (1986)
6. Connecticut: Conn. Gen. Stat. Ann. Sec. 54-869 (West Supp. 1989)
7. Delaware: Del. Code Ann. tit. 11, Sec. 3511 (1987)
8. Florida: Fla. Stat. Sec. 92.53 (West Supp. 1989)
9. Hawaii: Haw. R. Evid. 616

10. Illinois: Ill. Ann. Stat. ch. 38, para. 106A-2 (Smith-Hurd Supp. 1989)
11. Indiana: Ind. Code Ann. Sec. 35-37-4-8 (Burns Supp. 1989)
12. Iowa: Iowa Code Ann. Sec. 910A.14 (West Supp. 1989)
13. Kansas: Kan. Stat. Ann. Sec. 22-3434 (1988)
14. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278 Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)
17. Mississippi: Miss. Code Ann. Sec. 13-1-407 (Supp. 1987)
18. Missouri: Mo. Ann. Stat. Secs. 491.680-687 (Vernon Supp. 1989)
19. Montana: Mont. Code Ann. Secs. 46-15-401 to -403 (1987)
20. Nevada: Nev. Rev. Stat. Ann. Secs. 174.227 and 174.229 (1986)
21. New Hampshire: N.H. Rev. Stat. Ann. Sec. 517.13-a (Supp. 1988)
22. New Mexico: N.M. Stat. Ann. Sec. 30-9-17 (1986)
23. Ohio: Ohio Rev. Code Ann. Sec. 2907.41 (Baldwin Supp. 1987)
24. Oklahoma: Okla. Stat. Ann. tit. 22 Sec. 753 (West Supp. 1989)
25. Pennsylvania: Pa. Cons. Stat. Ann. tit. 42 Sec. 5984 (Purdon Supp. 1989)
26. Rhode Island: R.I. Gen. Laws Sec. 11-37-13.1 (Supp. 1988)

27. South Carolina: S.C. Code Ann. Sec. 16-3-1530(G) (1984)
28. South Dakota: S.D. Code Ann. Sec. 23A-12-9 (1988)
29. Tennessee: Tenn. Code Ann. Sec. 24-7-116 (Supp. 1988)
30. Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989)
31. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
32. Vermont: Vt. R. Evid. 807
33. Wisconsin: Wis. Stat. Sec. 967.04(7) (Supp. 1988)
34. Wyoming: Wyo. Stat. Sec. 7-11-408 (1987)

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No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on Behalf of People Against Child Abuse, Inc. (PACA), the Assoication For Childcare Excellence (ACE), and the Maryland Coalition Against Sexual Assault (MCASA)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Petition For A Writ of Certiorari
To The Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF PEOPLE AGAINST CHILD ABUSE, INC., THE ASSOCIATION FOR CHILDCARE EXCELLENCE, AND THE MARYLAND COALITION AGAINST SEXUAL ASSAULT

People Against Child Abuse, Inc., ("PACA"), the Association for Childcare Excellence ("ACE"), and the Maryland Coalition Against Sexual Assault ("MCASA") hereby respectfully move this Court for leave to file a brief as *amici curiae* in support of the State's Petition for a Writ of Certiorari. The consent of the attorneys for the Petitioner has been obtained for the filing of the brief *amici curiae* by PACA, ACE, and MCASA. The consent of the attorneys for

Respondent was requested by *amici* but was refused, because, at that time, Respondent's counsel stated that they did not intend to file a response to the Petition for a Writ of Certiorari.

People Against Child Abuse, Inc., ("PACA") is a statewide organization which is the Maryland Chapter of the National Committee for the Prevention of Child Abuse. PACA is dedicated to the prevention and elimination of child abuse and neglect in the State of Maryland. The Association for Childcare Excellence ("ACE") is a Maryland organization of parents and professionals which promotes safe and affordable child care for the citizens of Maryland. The Maryland Coalition Against Sexual Assault ("MCASA") is the network of Sexual Assault Centers in the State of Maryland: the Coalition works toward attitudinal change of institutions and the population at large. These organizations have considerable experience with and expertise in child abuse in day care settings. Some members are parents of abused children; others were themselves abused as children. Members also include prosecutors who have handled day care child abuse cases, and professionals who treat abused children. PACA was instrumental in the enactment of the current Maryland closed circuit television statute for the protection of child victims, the interpretation of which is at issue in this case.

Amici believe that the Court of Appeals of Maryland, in reversing the conviction of Sandra Ann Craig, a day care operator from Howard County, Maryland, has misconstrued the holding of this Court in *Coy v. Iowa*, ___ U.S. ___ , 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988). The Maryland court's literal construction of the Confrontation Clause, based on *Coy*, has not only

effectively nullified Maryland's statutory attempt to protect child victims of abuse, but has potentially threatened the viability of other similar State statutes, which require a showing of necessity before protective measures may be invoked. Thus, this case presents a question which has implications far beyond the particular facts now before this Court.

Because the *amici* believe that the case below was wrongly decided and because this case involves an issue of important public policy, the balance between the rights of criminal defendants and child victims, PACA, ACE, and MCASA wish to join Petitioner in urging this Court to grant a Writ of Certiorari and review this case on the merits. Consequently, the three organizations respectfully request that this Court grant them leave to file their brief *amici curiae* in the form submitted with this motion.

Respectfully submitted,

/s/ Paul A. Dorf

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QUESTIONS PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

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STATE OF MARYLAND,

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BRIEF *AMICI CURIAE* ON BEHALF OF PEOPLE AGAINST CHILD ABUSE, INC., THE ASSOCIATION FOR CHILDCARE EXCELLENCE, AND THE MARYLAND COALITION AGAINST SEXUAL ASSAULT

INTEREST OF AMICI CURIAE

This brief, in support of the Petition for a Writ of Certiorari filed by the State of Maryland, is submitted on behalf of People Against Child Abuse, Inc. ("PACA"), the Association for Childcare Excellence ("ACE"), and the Maryland Coalition Against Sexual Assault ("MCASA").

People Against Child Abuse, Inc. ("PACA") is a private, nonprofit, state-wide organization dedicated to the prevention and elimination of child abuse and

neglect in the State of Maryland. PACA is the Maryland chapter of the National Committee for the Prevention of Child Abuse. PACA attempts to accomplish its goals through legislative efforts, conferences on victims' rights, establishing support groups, and community education.

The Association for Child Care Excellence ("ACE") is a Maryland organization of parents and professionals dedicated to promoting safe and affordable child care for the citizens of Maryland. ACE advocates for child care licensing standards which will produce safe and enriching environments for children. One of ACE's primary goals is to increase protection for children in day care.

The Maryland Coalition Against Sexual Assault ("MCASA") is the network of Sexual Assault Centers in the State of Maryland, which serves as the primary state forum for influencing public policy and opinion regarding sexual assault. The objectives of the coalition are to share expertise, experience and knowledge among the centers and with the public at large; to insure that services are made available to all victims of sexual assault in the State regardless of age and sex; and to work toward the elimination of sexual assault through effective attitudinal change of individuals, institutions, and the culture at large.

The *amici* have an interest in this matter because they are child advocacy groups dedicated to advancing the rights and interests of victims of child abuse. The *amici* are convinced that as a result of the Maryland Court of Appeals' erroneous interpretation of this Court's decision in *Coy v. Iowa*, ___ U.S. ___ , 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988) and the Sixth Amendment to the United States Constitution, child

abuse victims will be unnecessarily traumatized and many perpetrators of child abuse will go unpunished.

The *amici*, therefore, submit this brief in support of the State of Maryland's Petition for Writ of Certiorari, and request that this Court clarify the constitutional protections provided to alleged perpetrators of child abuse by the Sixth Amendment to the United States Constitution, in light of its holding in *Coy*.

STATEMENT OF THE CASE

The defendant, Sandra Ann Craig, was convicted in the Howard County Circuit Court of child abuse, first and second degree sexual offense, perverted practice, and assault and battery on a child who had attended her day care center. At the trial, the victim, a girl then seven years old, as well as three younger children,[1] who the State alleged had also been abused by Craig at her day care center, testified via one-way closed circuit television. This procedure was authorized by Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (Supp. 1987) so long as the trial judge first "determines that the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

In upholding the conviction by use of closed circuit television in the *Craig* case, the Court of Special Appeals of Maryland found that the trial judge had properly relied on testimony by treating therapists as to each child's inability to communicate in the court-

[1] The other children were two 5-year-old boys and a 4-year-old girl.

room, 76 Md. App. 250, 544 A.2d 784 (1988). However, the Court of Appeals of Maryland reversed the conviction in the *Craig* case, relying on this Court's decision in *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988). Noting *Coy*'s insistence on the defendant's right to a face-to-face confrontation with her accuser, Maryland's highest court found that the threshold showing of necessity for use of closed circuit television in the *Craig* case was insufficient. The Court held that a judge may not rely solely on expert testimony to make a finding of witness unavailability under § 9-102(a)(1)(ii), but instead must observe the child being questioned in the defendant's presence.[2] If the judge concludes that the child cannot reasonably communicate because of serious emotional distress produced by the defendant's presence, he must then observe whether two-way television or any other device short of one-way closed circuit will enable the child to testify. *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989). It is only after this multi-step process that the trial court may utilize the closed circuit procedure of § 9-102.

REASONS FOR GRANTING THE WRIT

I. The Maryland Court of Appeals' Reading of *Coy* Eviscerates Maryland's Statutory Attempt to Protect Child Victims.

A substantial majority of states have recognized that the protection of child witnesses furthers an important public policy and have enacted statutes de-

[2] The Court considered inability of the child to testify in the courtroom as not sufficient to justify use of closed circuit television under the Sixth Amendment and § 9-102.

signed to protect child victims of abuse from the trauma of testifying in front of their abusers. Numerous researchers and commentators have documented the serious emotional trauma to young children caused by facing their abusers in legal proceedings. *See* D. Whitcomb, E. Shapiro, and L. Stellwagen, *When The Victim Is A Child: Issues for Judges and Prosecutors* 17-18 (1985); Goodman, Jones, Pyle *et al.*, "The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims," in *Proceedings from the International Conference on Child Witnesses: Do the Courts Abuse Children?* (British Psychological Association); *see also*, Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3-4 (1983); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 998-999 (1969); Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?*, 24 J. Fam. L. 146, 182-184 (1985-86); Melton, *Child Witness and the First Amendment: A Psychological Dilemma*, 40 J. Soc. Issues 109, 110 (No. 2 1984); J. Bulkley & H. Davidson, *Child Sexual Abuse—Legal Issues and Approaches* 11 (1980).

Yet, if the interpretation by the Maryland Court of Appeals of *Coy* is allowed to stand, it will effectively eviscerate Maryland's attempts to protect child victims via the closed circuit television statute. At best, the statute will be rendered useless; at worst, should a prosecutor utilize the statute, adopting the procedures prescribed in *Craig*, the resulting trauma to the child will be unacceptable. Indeed, by finding that *Coy* requires that "§ 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either

in or outside the courtroom) in the defendant's presence. . . .", 316 Md. 551, 560 A.2d at 1127, the Court requires infliction on the child witness of the very trauma which the statute is meant to alleviate.[3]

Although the jury convicted Craig, relying on *Coy*, the appeals court below reversed the conviction based on its belief that expert opinion was an insufficient basis to justify utilizing closed circuit television. In attempting to comply with the ruling in *Coy*, the Court set up a two-step procedure to determine when and if a child should be allowed to testify by closed circuit television. If the prosecution proceeds as mandated by the Court of Appeals of Maryland, the child is first subjected to a face-to-face confrontation with the abuser. Should the child exhibit the requisite "severe emotional distress", then the child passes the first test and is entitled to face the next obstacle. In step number two, the child is now tested to see if he or she is capable of testifying utilizing two-way television. Only if the victim proves to be demonstrably unable to proceed using two-way television, may the child finally be permitted to testify by closed circuit television as provided in the Maryland statute, *Craig*, 316 Md. 551, 560 A.2d at 1128.

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[3] In the case at bar, the trial court heard extensive and specific opinions from various expert witnesses about what effect the defendant's presence would have on each of the child victims if the child were forced to face the defendant in court. Mary Burke, a treating child therapist with the Howard County Sexual Assault Center, testified that it would be difficult or impossible for the victim to sit in the same room with Sandra Craig, that the fear and anxiety would manifest itself by disruptions in her breathing, that she would curl up in a ball, and that two other children would burst into tears and be unable to proceed (E.75,80,85).

Under this procedure, a child victim is not entitled to the protection intended by the statute unless the child breaks down twice. It not only subjects children to unnecessary trauma, it also will have a devastating effect on the ability of the State to prosecute child abusers. First, a child who has been severely traumatized twice in the courtroom will likely be in such shambles that the child will be unable to proceed even via the one-way closed circuit television.

But, more fundamentally, neither responsible prosecutors nor parents will be willing to put children through this further ordeal, with a consequent loss in ability to prosecute child abusers. As it is, this Court has recognized: "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are not witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 987, 94 L.Ed. 2d 40, 59 (1987). The multiple step procedure required by *Craig* virtually guarantees abusers immunity from prosecution by rendering the only witnesses to their crimes mute.

It is well documented that many parents, recognizing how grueling the criminal process can be, have failed to report sexual assaults in order to protect their children from courtroom trauma. J. MacDonald, *Rape Offenders and Their Victims*, 128-29 (1971). Parents who are willing to permit their children to testify at all, do so primarily for the benefit of society. The hope is that the child's testimony will convict the abuser so that he or she will not be in a position to abuse someone else's child. If the burden of testifying becomes too heavy, these parents simply will not permit their children to be exposed to the trauma of the judicial system. The abuser will be free to continue.

Furthermore, the overly narrow application of the ruling of *Coy* by the Court of Appeals of Maryland in *Craig* impedes, rather than aids, the truth-seeking function of the court. Whereas having the adult accuser face the accused has historically enhanced the truth-finding process, see *Pointer v. Texas*, 380 U.S. 400, 408, 85 S.Ct. 1065, 1068, 13 L.Ed. 2d 923 (1965), the contrary is more often the result with children. As a recognized expert in forensic psychology testified in *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984):

> [T]he victim has the capacity to testify truthfully. It was [the doctor's] opinion, however, that avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony. He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.

There is little danger that prosecutors would overuse closed circuit television. A witness who is able to communicate in open court, especially in front of a jury, is far more effective than one whose testimony can only be heard and seen by the jury on a television screen. *See* Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?* 24 J. Fam. L. 149, 240 (1985-86). Thus, for tactical reasons, prosecutors would not consider using closed circuit television unless they were dealing with a child who had been so traumatized that the child could not communicate effectively in open court in the defendant's presence. But it is precisely *this* kind of child who would be subjected to the approach of the Court of Appeals of Maryland.

This abused child frequently has suffered from the abusive acts not once but repeatedly over an extended period of time and has been seriously threatened by the abuser in order to intimidate the child into silence. *See* MacFarlane, "Sexual Abuse of Children," in *Victimization of Women* 81 (J. Chapman & M. Gates eds. 1978). Commonly, children are told that if they tell, their parents won't love them anymore, their parents will die, they will be killed, or they will get in a lot of trouble. *See, e.g., State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d at 1332. In day care abuse cases, such

as *Craig*, researchers have concluded that, in order to force cooperation and silence, children are "more threatened, coerced and terrorized than in many other kinds of sexual abuse . . . The fear and terror that many of the children suffered as a result of being threatened and coerced seem to be a special part of the situation of day care abuse." Finkelhor, Williams, Burns and Kalinowski, *Sexual Abuse in Day Care: A National Study* at 89 (March, 1988).[4]

This threatened and repeatedly abused child is now asked to confront face-to-face, not once but twice, the very person who threatened and terrorized him or her. A child so traumatized is more likely, out of fear, to recant or refuse to speak at all, rather than hazard the terrible consequences of telling the truth.

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[4] The authors studied cases of sexual abuse in day care nationwide occurring from 1983-1985. In 270 facilities where substantiated abuse had occurred, there were a total of 1,639 victimized children. The authors found that "[s]ome kind of physical force—ranging from holding a child down, to tying her up, to hanging a child up by his heels—was present in 31% of all cases, and the threat of force in 42%." *Id.* at 85. As they noted:

> Threats of force were even more common than the actual use of force. Children were threatened with death, beatings, humiliations and punishments. Threats were made against their families and their pets. They were taken to graveyards and told that this was where they or their parents would be put. But with such young children, even threats that would appear innocuous to adults may have taken on very terrorizing aspects. Children were threatened with snakes, spiders, wild animals and monsters. In some of the ritual cases, perpetrators claimed to have supernatural powers. These were probably among the most terrorizing of the experiences that children had.

Id. at 87.

Thus, the Court of Appeals' interpretation of *Coy* results in a triple victimization of the child (once by the abuser, twice by the court). The two-step procedure required by *Craig* will substantially hinder, rather than help successful prosecution of child abuse, undermining the purpose of Maryland's closed circuit statute.

II. *Craig* Provides the Oppportunity to Clarify *Coy v. Iowa*.

A. *Coy* Has Cast A Shadow Over Many States' Child Protection Statutes.

Coy v. Iowa answered only the question of constitutionality of an unusual state statute that *assumed* that alleged child victims of sexual abuse would be traumatized by seeing the defendant charged with the abuse. It alluded to, but left unanswered, the question of constitutionality of the much more predominant type of state statute, such as Maryland's, which provides for protective steps to be taken only after an individualized finding of necessity has been made.

Coy left unresolved three pivotal questions: (1) whether a statute which requires an individualized showing of necessity before protective procedures may be used is constitutional; (2) what *degree* of necessity must be shown by the prosecution before the protective procedure may be used; and (3) *how* must that showing of necessity be made.

At least four sitting Justices—those concurring and those dissenting in *Coy*—would seem inclined to find a state statute requiring a case-specific finding of necessity to be shown, to be constitutional. Nonetheless, the statutes of all such states, permitting closed-circuit and videotaped testimony, are cast in shadow by

Coy. This is particularly disturbing in light of the fact that many of these statutes had been upheld by state courts as constitutional, before *Coy*. *E.g.*, *State v. Chisholm*, 243 Kan. 270, 755 P.2d 547 (1988); *Commonwealth v. Willis*, 716 S.W.2d 244 (Ky. 1986); *State v. Racca*, 525 So.2d 1229 (La. Ct. App. 1988); *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987); *People v. Kasben*, 158 Mich. App. 252, 404 N.W.2d 723 (1987) (preliminary hearing); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984); *People v. Algarin*, 129 Misc.2d 1016, 498 N.Y.S.2d 97 (N.Y. Sup. Ct. 1986); *Commonwealth v. Lohman*, 536 A.2d 809 (Pa. Super. 1988).

The Maryland statute requires that the trial judge determine that testifying in open court would cause the child such "serious emotional distress" that he or she "cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (Supp. 1987). *Craig*, relying on *Coy*, holds that the Constitution requires that the child victim be questioned *in front* of the defendant, in order for the judge to determine whether the child requires the protection of the statute.

If the interpretation of the Sixth Amendment Confrontation Clause by the court in *Craig* is correct, then many other states' protective statutes are unconstitutional. For example, Indiana Code Annotated § 35-37-4-8(d)(1)(C)(i) allows certification by a psychiatrist that the child would be traumatized by so testifying, to show that the child is unavailable to testify. *Altmeyer v. State*, 496 N.E.2d 1328 (Ind. App. 1986). Under the Maryland Court's interpretation of *Coy*, this statute would be unconstitutional. So too would be California Evidence Code § 240, which provides

that expert testimony regarding the child's trauma is sufficient.

Thus, this Court can use *Craig* to clarify the questions of whether and when the state's interest in protecting its child abuse victims is so compelling as to override the defendant's right to be in the same room, and face-to-face, with the child, and how that showing may constitutionally be made.

B. The Rationale Of *Coy* Is In Apparent Conflict With Other Decisions By This Court.

Coy's emphasis on the literal meaning of the word "confrontation" is in apparent conflict with cases such as *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537-2538, 65 L.Ed.2d 597, 605-607 (1980) (literal interpretation of confrontation clause rejected as "unintended and too extreme;" hearsay may be admitted against accused if state has made showing of necessity, as by unavailability of the hearsay declarant, and statement bears sufficient indicia of reliability); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 2d 514 (1986) (emphasizing lack of cross-examination as central to finding of violation of right of confrontation); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965) (*semble*); and *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed. 2d 144 (1987) (admission under Fed. R. Evid. 801(d)(2)(E) of out-of-court statement of an unavailable coconspirator does not violate accused's confrontation right; coconspirator hearsay exception (nonhearsay under Fed. R. Evid.) is firmly enough rooted in our jurisprudence that, under *Ohio v. Roberts*, a court need not independently inquire into the reliability of such statements); *see also United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed. 2d

390 (1986) (coconspirator need not be shown to be unavailable to testify before coconspirator's statement made during and in furtherance of the conspiracy may be admitted against defendant). *Cf. Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed. 2d 631 (1987) (accused's confrontation right was not violated by barring him, but not his counsel, from pretrial hearing on whether child sexual abuse victims were competent to testify at trial).

These conflicts have aroused much comment and created debate about which model is the true one: the literal reading of the confrontation clause in Justice Scalia's opinion in *Coy*, or the cross-examination model of the cases such as *Lee v. Illinois* and *Douglas v. Alabama*, permitting even the admission of uncross-examined hearsay when a showing of necessity and reliability is made, under *Ohio v. Roberts* and *Bourjaily; see, e.g.*, Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 Ky. L.J. 7 (1988) (discussing hearsay and the confrontation clause as separate concepts and their conflicting relationships); Lilly, *Notes on the Confrontation Clause* and *Ohio v. Roberts*, 316 U. Fla. L. Rev. 207, 207 (1984) ("an intractable problem in criminal trials"); *Supreme Court Ramifications: Reliability of Codefendant Confessions and the Confrontation Clause: Lee v. Illinois*, 2 J. Legal Comm. 121, 124-25 (1987) (noting conflict between permitting exceptions to the hearsay rule and a literal interpretation of the confrontation clause); Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of Practical Analysis*, 14 Fla. St. U. L. Rev. 949 (1987); Comment, *Balancing the Right to Confrontation and the Need to Protect Child*

Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?, 12 U. Puget Sound L. Rev. 109 (1988) (arguing that the "hearsay" model of *Ohio v. Roberts* is inapplicable where a child testifies on closed circuit television, because the child is for all practical purposes available to testify, and that what the author believes to be the more lenient model of *Coy* should apply).

This Court can use *Craig* as the vehicle to resolve the apparent conflict between its earlier decisions and the literal approach espoused in *Coy*.

CONCLUSION

By its overly strict interpretation of the confrontation requirement of the Sixth Amendment, the Court of Appeals of Maryland, relying on *Coy*, has effectively nullified Maryland's closed circuit television law meant to protect child victims: a statute that, by its own terms, requires a case-specific finding of necessity before the closed-circuit procedure may be used. The Court, in erecting a two-step confrontational hurdle for children and prosecutors to surmount before the protective procedures in the statute may be invoked, has required that abused children be subjected to that very emotional trauma from which the law was intended to protect them.

This case provides this Court with the opportunity to address several questions clouded by *Coy*, most particularly, the constitutionality of a state statute requiring a case-specific showing of necessity and any constitutional limitations on how that showing may be made.

For these reasons, *amici* request this Court to issue a Writ of Certiorari to the Court of Appeals of Maryland.

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IN THE UNITED STATES SUPREME COURT
October Term, 1989
Case No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER*

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*The States joining in this brief are listed in Appendix "A" of this brief.

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QUESTION PRESENTED

WHERE INDIVIDUALIZED FINDINGS REGARDING THE NEED TO PROTECT CHILD WITNESSES ARE MADE AND THE WITNESSES, AGES FOUR TO SEVEN, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, DOES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE MAY BE INVOKED?

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INTEREST OF AMICI CURIAE

The States joined herein as amici curiae*, are deeply concerned with the decision of the Court of Appeals of Maryland because the ruling of the Court of Appeals as applied would have a detrimental effect on eliciting truthful testimony from the victims of child sexual abuse.

An overwhelming majority of states have statutes designed to protect the child victims of sexual abuse from the trauma associated with testifying in front of the abuser. Forty-one states have laws protecting child witnesses. Twenty-seven states have enacted videotaping statutes. Twenty-two states have enacted hearsay exception statutes. Twenty-six states have enacted courtroom

*The States joining this Petition are listed in Appendix "A" of this Brief.

closure statutes. Twenty-one states have enacted closed-circuit television statutes.[1] (See Petitioner's Appendix "C").

Rejection of Maryland's procedure for protecting child victims of abuse will weaken national efforts aimed at eradicating these crimes against society's most helpless victims.

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[1] Forman, "To Keep the Balance True: The Case of Coy v. Iowa," 40 Hastings L.J. 437, 439 (1989).

ARGUMENT

The Amicus States agree with the Petitioner that the protection of child abuse victims is an issue of great public importance, and that the decision below in the Craig case represents an erosion of that protection. Conservative estimates of child sexual abuse point to an occurrence rate of between 100,000 and 300,000 cases a year nationwide.[2] The problem has moved Senator Arlen Specter, Chairman of The Subcommittee on Juvenile Justice to remark that:

> The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes. Investigations. . .and filings of criminal complaints have no doubt increased in part because of public awareness campaigns. Children's television programming is peppered with public service announcements featuring child celebrities urging children

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[2] D. FINKELHOR, Child Sexual Abuse 1-2 (1984) See also Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum.L.Rev. 1745 (1983). See also:

to tell someone if they have been abused. Many cartoon programs contain story lines with the same message."[3]

Certainly reported cases have increased. See ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT, REPORT OF THE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, J.R. REP. No. 260, 100th Cong., 1st Sess. (1987). Based on an extensive survey with detailed statistics of the 50 states and the District of Columbia, this Report indicates that "[c]hild abuse and neglect, as reported to State child welfare agencies, have increased steadily since 1976 when reports were first available. Between 1981-85, reports of child abuse and neglect rose by more than half (54.9%) nationwide." Id. at 1. "In 1985 alone, an estimated 1,876,564 children [in the United

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[3] Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 77 (1984). (Statement of Senator Arlen Specter, Chairman, Subcommittee on Juvenile Justice, with Vartabedian & Vartabedian, supra note 1, at 17.)

States] were reported to child protective service agencies as having been abused or neglected. . . ." Id. at 4; see also Lexington Herald-Leader, April 11, 1987, at B2, cols. 3-6 (According to the Kentucky Department of Social Services, "[t]here were just over 2,000 confirmed sexual attacks [on children reported in Kentucky during 1986], compared with 400 in 1980, and 10,160 cases of physical [child] abuse in 1986 compared with 3,811 in 1980.").

A serious impediment to eliciting truthful testimony from the victims of child sexual abuse is an inability of the child to recount the incident(s) of abuse in the presence of the abuser. Threats of retaliation, blackmail, or peer pressure, the "pledge of silence," obedience to the authority figure (abuser), and guilt or fear of exposure all can establish a virtually tight, impervious bond between the accused and the victim, resulting in inaccurate or misleading testimony.[4]

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[4] BURGESS, Child Sex Initiation Rings, 51 AMERICAN JOURNAL OF ORTHOPSYCHIATRY III (Jan. 1981).

Prior to the enactment of recent protective statutes, criminal trial juries seldom heard from the children most traumatized by sexual assault and least capable of testifying because of the consequent psychic injury.[5] Psychiatrists believe that psychological damage is caused not only by the abuse but also by related subsequent events such as having to testify in open court in the same room as the defendant.[6] Children asked to testify in court can "become so further traumatized by the prospect of testifying in front of their alleged abusers that they cannot speak of the incident."[7] Studies of children

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5 Lambert, "Victims Have Rights Too," 25 Utah L. Rev. 449, 455 (1986).

6 Bainor, "The Constitutionality of the use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes," 53 Fordham L. Rev. 995, 1017 (1985); L. Schultz, The Sexual Victimization of Youth (1980); Wixom, note 8 supra.

7 Hill & Hill, "Videotaping Children's Testimony: An Empirical View," 85 Mich. L. Rev. 809, 827 (1987). Coy v. Iowa, 108 S. Ct. at 874, states:

who have testified in court indicate that such testimony is associated with increased behavioral disturbances in children [quoting Goodman et al., "The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Proceedings from tne International Conference on Child Witnesses: Do the Courts Abuse Children?" (British Psychological Association, in press)].

Several researchers have determined that traditional court procedures add to a child's psychological scars, producing "system-induced trauma."[8] One study[9]

> To the child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming [quoting Whitcomb, Shapiro & Stellwagen, "When the Victim is a Child," Issues for Judges & Prosecutors 17-18 (1985)].

8 Colby & Colby, "Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example," 66 Child Welfare 25 (1987); Conte, "The Justice System and Sexual Abuse of Children," 58 Social Serv. Rev. 556-568 (1984); Libai, Protection of the Child Victim of a Sexual Offense in the

compared a sample of children who had testified in court with a random sample of sex abuse victims and found that 73 percent of the court victims had behavioral problems compared with only 57 percent of the random sample. The researchers attributed these differences to the trauma of testifying in court. Others have also reported that child sex abuse victims who must participate in court proceedings experience greater trauma than those who do not. These differences, however, may be attributable to the fact that it is usually the most serious cases that result in a trial.[10]

Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very

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Criminal Justice System," 15 Wayne L. Rev. 977, 982 (1969).

9 Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice," 40 J. Soc. Issues 157, 167 (1984).

10 Id.

existence of the child's testimony.[11] The child can become so intimidated by the presence of the defendant that he or she cannot speak about the incident.[12] As Justice Blackmun noted in his dissent in Coy v. Iowa, the use of protective measures can actually enhance the reliability of the testimony of child sex abuse victims.[13]

Research indicates that direct confrontation with a defendant can have a significant and detrimental impact on memory.[14] In one study, children watched a father-daughter confrontation on videotape. The children were then questioned in a law school courtroom or a room with two-way mirrors and a microphone suspended from the ceiling (to stimulate videotape testimony). The children testifying in the latter

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11 Hill & Hill, note 21 supra, at 820

12 Id. at 827.

13 Coy v. Iowa, 108 S. Ct. at 874.

14 Hill & Hill, note 21 supra, at 814-815.

setting answered specific questions correctly more often and said "I don't know" or gave no answer significantly less often. This suggests that taking children's testimony via closed-circuit television instead of in open court may actually enhance the veracity of the child's statements.[15]

Face-to-face confrontation between a victim accuser and a defendant accused is a most terrifying experience, and one which is aggravated when the accusations involve socially taboo conduct. The child and even his parent may be ignorant of the judicial process and sometimes do not realize that they will eventually encounter the offender in the courtroom.[16]

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15 Bjerregaard, "Televised Testimony as an Alternative in Child Sexual Abuse Cases," 25 Criminal Law Bulletin 164, 171 (1989).

16 Preserving the Child Sexual Abuse Victims Testimony: Videotaping is not the Answer, 2 DETROIT COLLEGE OF LAW REV. 469, 479 (1987).

Such face-to-face confrontation is even more terrifying when the adult offender is a member of the child's family, a relative, or a friend. Since the majority of child sexual abuse prosecutions involve these type of defendants, it is not hard to imagine the devastating impact on a child who must explain the details of a sexual encounter in front of the defendant, with whom the child has learned to love and trust but who may have threatened the child into silence.[17]

Twenty-one states have statutes providing for the use of one-way or two-way closed circuit television testimony of child victims. (See Petitioner's Appendix "C"). These statutes are designed to protect child victims of sexual abuse from further trauma associated with the prosecution of the abuser.[18]

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17 Id.

18 Florida's Section 92.54, Florida Statutes (1985), provides for the use of closed circuit television testimony. The Florida Supreme Court has consistently upheld the constitutionality

The use of two-way closed-circuit television is unique in that it does provide the opportunity for the accuser to view the accused and vice versa. The use of such a technique closely approximates the traditional courtroom testimony since the child testifies under oath, within full view of the jury, and is subjected to unrestricted cross-examination. Therefore, the substantive concerns of the confrontation clause remain fully protected. Together, these factors help ensure the fairness of the proceedings by allowing the child and the defendant to see each other.

Furthermore, the opportunity for the trier of fact to observe the witness's demeanor is preserved with the use of televised testimony. In **People v. Algarin**, 129 Misc. 2d 1016, ____, 498 N.Y.S.2d 977, 981 (1986), the court

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of Florida Statutes providing for the out-of-court testimony of child sexual abuse victims. See e.g. **Glendening v. State**, 536 So.2d 212 (Fla. 1988) cert. denied 109 S.Ct 3219 (1989).

stated: "It is apparent to this court from a demonstration of the equipment used in this case that closed circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public. . . . [I]nstantaneous closed circuit television can surely satisfy the dictates of the Confrontation Clause.";

In **State v. Sheppard**, 197 N.J. 411, ____, 484 A.2d 1330, 1341 (1984) the court stated: "Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function." (quoting **People v. Moran**, 114 Cal. Rptr. 413, 420, 39 Cal.App.3d 398, 410 (1974);

In **Kansas City v. McCoy**, 525 S.W.2d 336, 339 (Mo. 1975) the court held that that televised testimony did not significantly affect the ability to question and observe the witness, and jury impact was found to be little different, whether the witness appeared in court in person or by television. Modern televising techniques are capable of presenting clear and undistorted images, and in some instances are an

improvement over the view that the jury has of the witness.[19] For example, with the use of a zoom lens and large television screens, the witness's facial details can be observed with great clarity.[20]

Last, the child testifies while under oath, preserving the seriousness and solemnity of the occasion.

Contemporaneous televised testimony adheres closely to the giving of testimony in the traditional courtroom setting, except that the child is not in the physical presence of the defendant. Thus, televised testimony is the functional equivalent of testimony from within the courtroom. In **State v. Jarzbek**, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987) the court wrote; "We agree with the state that the circumstances surrounding the taking of the minor victim's testimony make it

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19 **See State v. Twist**, 528 A.2d 1250, 1258 (Me. 1987); **Commonwealth v. Willis**, 716 S.W.2d 224, 228 (1986).

20 **See Sheppard**, 197 N.J. at ____, 484 A.2d at 1334.

inherently more reliable than the out-of-court declarations characterized as hearsay. Rather than view the videotaped testimony as hearsay, we therefore consider it to be the functional equivalent of testimony in court."; (See also **Commonwealth v. Willis**, 716 S.W.2d 224, 228 (Ky. 1986) ("[T]elevised testimony under [the Kentucky] statute is not hearsay. It is the functional equivalent of testimony in court."). This is a far cry from the one-way screen used in Coy.[21]

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21 Prof. Paul J. Papak of the University of Iowa College of Law, who represented Mr. Coy before the [United States] Supreme Court, says he recreated the scene by entering the courtroom where the defendant was convicted and dragging out the screen to see how it worked.

"It's hard to adequately describe its impact," he says. The courtroom's lights were turned off, its blinds were drawn, and a panel of four, bright-focus lights were trained onto the screen in order to activate the one-way coating.

The two girls could see only the reflection of the judge's bench next to them, he says. The defendant saw a darkened image of the two witnesses. In the trial record, Professor Papak notes, the judge described the effect as "dramatic" and "eerie."

The States joining this Petition submit that the Craig decision conflicts with Coy v. Iowa, 487 U.S. ____, 108 S.Ct. 2798 (1988) in that the Maryland court overextended Confrontation Clause precepts without giving due weight to the compelling public interest of protecting child sex abuse victims. See Coy v. Iowa, supra, (O'Conner, J. concurring);

> "...I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy... The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy." 101 L.Ed.2d at 869.

Less drastic and more logical alternatives exist. An adequate showing of the probability of emotional trauma can be made without requiring the presence of the defendant at the

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Coyle, Application of Confrontation Clause a Difficult Issue in Child Abuse Cases," ____ Nat'l L.J. 1, 10 (1987).

pretrial hearing by using expert psychological testimony and personal observation of the victim by the judge.[22]

Maryland's statute accomplishes the constitutional task of affording the defendant his right of confrontation while also protecting the rights of children. The misguided effort of the Maryland court of appeals creates conflict between Maryland and the plurality in Coy v. Iowa and the other state decisions discussed by Petitioner in its brief. The court's action misapplied the holding in Coy v. Iowa and imposed an unrealistic procedure which will result in further harm to child sex abuse victims.

Accordingly, the states joined herein as amici curiae respectfully urge this Court to accept certiorari in this case.

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22 See The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child, 42 U.MIAMI L.REV. 1033 (1988).

CONCLUSION

The States joining this Petition submit that certiorari should be granted to review the decision of the Court of Appeals of Maryland.

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Supreme Court, U.S.
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No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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CERTIORARI GRANTED JANUARY 16, 1990

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The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

Reported Opinion of the Court of Appeals of Maryland, *Sandra Ann Craig v. State of Maryland*, No. 110, September Term, 1988 (filed July 24, 1989) . 1a

Reported Opinion of the Court of Special Appeals of Maryland, *Sandra Ann Craig v. State of Maryland*, No. 1547, September Term, 1987 (filed August 3, 1988) 22a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 16, 1986	Indictment filed in the Circuit Court for Howard County, Maryland.
January 13, 1987	Motion for the Use of Closed Circuit Television by Child Victims filed.
January 16, 1987	Defendant's Opposition to State's Request for Use of Closed Circuit Television filed.
January 20, 1987	Hearing on use of closed circuit television commenced.
January 21, 1987	Hearing on use of closed circuit television concluded; motion for use of closed circuit television granted.
March 2, 1987	Voir dire of prospective jurors commenced.
March 3, 1987	Voir dire of prospective jurors continued.
March 4, 1987	Voir dire of prospective jurors continued and jury selected.
March 16, 1987	Trial commenced; State's case in chief commenced.
March 17, 1987	State's case in chief continued.
March 18, 1987	State's case in chief continued.
March 19, 1987	State's case in chief continued.
March 20, 1987	State's case in chief continued.
March 23, 1987	State's case in chief concluded; defendant's case commenced.
March 24, 1987	Defendant's case continued.
March 26, 1987	Defendant's case continued.

March 27, 1987	Defendant's case continued.
March 30, 1987	Defendant's case concluded; State's rebuttal commenced.
March 31, 1987	State's rebuttal concluded; defendant's surrebuttal commenced and concluded.
April 1, 1987	Jury instructed; jury begins deliberations.
April 2, 1987	Jury returns guilty verdicts for first degree sexual offense, second degree sexual offense, child abuse, unnatural perverted sexual practice, assault, and battery.
September 21, 1987	Second Amended Motion for New Trial filed; motion denied after hearing; defendant sentenced to 10 years for each of first degree sexual offense, second degree sexual offense, child abuse, and unnatural perverted sexual practice, said sentences to run concurrently; defendant's notice of appeal filed.
August 3, 1988	Opinion and judgment of the Court of Special Appeals of Maryland.
October 14, 1988	Defendant's petition for writ of certiorari filed.
December 21, 1988	Order of Court of Appeals of Maryland granting petition for writ of certiorari.
July 24, 1989	Opinion and judgment of the Court of Appeals of Maryland.

IN THE
CIRCUIT COURT
FOR HOWARD COUNTY

Criminal Nos.: 15468 & 15568
Criminal Nos.: 15458 - 15467,
15569, 15625 & 15737

STATE OF MARYLAND

vs

JAMAL CRAIG
SANDRA CRAIG

FILED JAN 13 1987

MOTION FOR THE USE OF CLOSED CIRCUIT TELEVISION BY CHILD VICTIMS

Now comes the State of Maryland by and through A. Gallatin Warfield, III and Kate O'Donnell, Assistant State's Attorneys, and, pursuant to Maryland Rule 4-252(c), and Section 9-102 Courts and Judicial Proceedings Article, respectfully represents unto this Honorable Court as follows:

1. That the above-referenced cases each involve a "child" victim.

2. That the State intends to offer the testimony of each child victim at each separate trial of the Defendants.

3. That in each case, testimony of the child victim in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate.

4. That the State hereby requests that the Court permit the testimony of the child victim in each case to be pre-

sented by way of closed circuit television and that the procedures outlined in Section 9-102 Courts and Judicial Proceedings Article be utilized in implementing such a method.

WHEREFORE, the State respectfully prays that the testimony of the child victims in the herein noted cases be conducted by means of closed circuit television.

/s/ A. Gallatin Warfield, III
A. Gallatin Warfield, III
Senior Assistant State's Attorney

/s/ Kate O'Donnell
Kate O'Donnell
Senior Assistant State's Attorney

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY

CASES #'s: 15458-15467
15569, 15625, 15737

STATE OF MARYLAND

vs.

SANDRA CRAIG

FILED JAN 16 1987

DEFENDANT'S OPPOSITION TO STATE'S REQUEST FOR USE OF CLOSED CIRCUIT TELEVISION

Comes now the Defendant, SANDRA CRAIG, by and through her attorney, FRED KOLODNER, Esquire and requests that the State's Request for Use of Closed Circuit Television pursuant to Section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code be denied and as reasons therefor states:

1. Before a child may testify by means of closed circuit television, the judge must first determine that testimony by the child will result in the child suffering such serious emotional distress that the child could not reasonably communicate.

2. That there has been no such finding except for the self-serving allegations attributed to the State.

3. That the judge impliedly must find that the child is not competent to testify and is therefore unavailable. The Defendant has *never* been advised by the State that any children (witnesses) are unavailable to testify.

4. That the use of closed circuit television for these proceedings violates the Defendant's right to confrontation

of witnesses. This is a fundamental guarantee as stated in the Sixth Amendment of the Constitution: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

5. Recollection, communication and truthfulness are enhanced by a face-to-face confrontation. Since the Defendant must remain in the courtroom and not in the presence of the testifying witness pursuant to the above-referenced section, this right of confrontation, although artificially maintained, is lacking.

WHEREFORE, the Defendant, SANDRA CRAIG, prays this Honorable Court as follows:

1. Order that the State's Request for Use of Closed Circuit Television for the children be denied.

2. Order such other and further relief as the nature of the case may entail.

/s/ Fred Kolodner
FRED KOLODNER
Attorney for Sandra Craig
Suite 108, 1055 Taylor Avenue
Towson, Maryland 21204
583-8785

[Certificate of Mailing omitted in printing]

[1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Cases 15458
through 15467, 15569
15625 and 15737

Criminal Cases 15468 and 15568

STATE OF MARYLAND

Vs.

SANDRA A. CRAIG,

Defendant

And

Jamal D. Craig,

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motion In Limine and Motion To Use Video Tape)
VOLUME I OF II

Howard County, Maryland
Tuesday, January 20, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.

APPEARANCES:
For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defendant:
F. Kolodner, Esquire

Janet Falkenstine-Secretary/Court Reporter
Circuit Court for Howard County
8360 Court Avenue
Ellicott City, Maryland 21043

[1-30]

* * *

MR. WARFIELD: Thank you Your Honor. All right. Your Honor, the second matter involves the use of closed circuit television for the testimony of the child victims in this case. I might also state that—that this would include all the cases and that is obviously in an attempt to resolve this issue in advance of trial. I would ask the Court pursuant to Maryland Rule, or excuse me, Courts and Judicial Proceedings Article Section 9-102 which is a 1985 law which permits this, I submit to the Court, I will proffer or I will submit the testimony of various witnesses at this time for the limited purpose of establishing that the various child victims in this case would in fact be—would not be amenable to coming into court and testifying, that they should in fact be permitted by the Court to testify by way of closed circuit television and I will present the witnesses. I have three today and three for tomorrow, as they relate to each named individual. Some of the witnesses see more than one child so we will get a number of children out of the way with any given witness, but that's what I propose to do and I ask the Court to limit the inquiry to that very narrow issue.

THE COURT: It's understood, gentlemen, that that [1-31] is the narrow issue. All the other issues as we indicated previously, issues like the relevance of this testimony, competency of these particular witnesses are not being addressed. The sole issue is whether or not it is appropriate for the Court to permit these children to testify by means of closed circuit television, period. That's understood.

MR. KOLODNER: And I would also like to raise the objection at this time to the use of closed circuit television on at least the theory that while I recognize that there is a statute and I recognize that this has been used in the courts in Maryland and in this very court before, but I raise the question of the constitutionality of this procedure in itself besides the people testifying today.

THE COURT: And it's understood that's an appropriate matter for the Court to consider not only the appropriateness of the use of this device in this particular case but whether or not it's permissible for the Court to do so.

MR. WARFIELD: Your Honor I—yeah, I'm not—obviously he can raise any objection that he wishes. Clearly the—that's a constitutional question which I believe is under advisement by some of our courts——

THE COURT: But it's an appropriate subject matter for this hearing today.

MR. KOLODNER: I contend that this Court could [1-32] rule today that it is not constitutional, that whether other courts in this courtroom have permitted the use of it is not material. I present to Your Honor that it is unconstitutional, that Your Honor has the right to determine whether or not it is constitutional——

THE COURT: And it seems to me that's an appropriate matter for the Court to consider.

MR. WARFIELD: Well again, I—quite frankly Your Honor, this is a little bit of a surprise from the standpoint of—obviously he cannot be precluded from raising the constitutional question and certainly he can do that. Our opposition will be based upon the fact that it is a current statute and I believe we have some authority from other jurisdictions——

THE COURT: Sure, everybody agrees.

MR. WARFIELD: —He can raise the issue.

THE COURT: The issue of one, whether or not it is appropriate for the Court to receive closed circuit television or permit closed circuit television is the issue before this Court today as well as, I guess, the constitutionality of the very statute which permits it. All the other questions dealing with the subject matter of the children's testimony, whether they are competent to testify, whether their testimony about other incidents is relevant is left for another day.

[1-33] MR. KOLODNER: Yes sir and I place before the Court that I object to this proceeding——

THE COURT: I understand——

MR. KOLODNER: —on the grounds that——

THE COURT: —and I'll consider any argument you want to make.

MR. KOLODNER: —on the grounds that the statute under which the State is bringing this motion before the Court is unconstitutional and that the use of this procedure is unconstitutuional [sic] in that it violates the defendant's right as guaranteed by the Constitution of the United States by the Sixth Amendment of the Constitution—specifically the Sixth Amendment of the Constitution of the United States in that the confrontation of the prosecuting witness or the person testifying not being confronted by the person charged.

THE COURT: May I suggest gentlemen and I'm not trying to forestall any legal arguments counsel want to make concerning the constitutionality of the statute. We've been told that we have witnesses available. Let's conduct an evidentiary hearing on whether or not the Court should consider utilizing consistent with the statute and in the course of legal argument, I'll hear from you concerning one, whether the Court as a fact finder should permit it

and two, whether it's constitutional. Let's get the evidence on. Is that appropriate——

[1-34] MR. KOLODNER: Yes sir.

THE COURT: —reserving to the Defendant the right to object.

MR. KOLODNER: Yes sir.

THE COURT: Let's proceed.

MR. WARFIELD: Very well Your Honor. The State would call Anna Hoover as its first witness please.

(Witness Sworn)

THE CLERK: State your name and address please.

THE WITNESS: My name is Anna Anderson-Hoover. My home addrsss is 624 Newbridge Court, Arnold, Maryland, and my office address is 8 Willow Street, Annapolis, Maryland.

MR. WARFIELD: All right, Mrs. Hoover, I would ask you, this is a bit of an awkward setup in the courtroom I have to——

THE COURT: Why is it awkward.

MR. WARFIELD: Well, because I'm questioning her and she's going to be responding to Your Honor, so she's got to either—either I've got to move or——

THE COURT: Do you want me to move.

MR. WARFIELD: No. If—I'm—what I'm asking I will ask you questions and if you could address your responses to the Judge I would appreciate it and I apologize for critizing [sic] your courtroom, Your Honor.

THE COURT: I didn't design this courtroom. Why [1-35] should I be sensitive about it. Whatever gave you that impression. Go ahead.

MR. WARFIELD: Very well.

THE COURT: That issue's never been raised before, the uniqueness of this courtroom.

THE WITNESS: I'll just turn my head.

MR. WARFIELD: That's okay, all right. I'll ask you the questions and if you could direct your responses to the Judge I would appreciate it.

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Mrs. Hoover, can you tell the Court what your occupation is?

A. I'm a Licensed Clinical Social Worker in private practice in Annapolis, Maryland.

Q. All right, and can you tell the Court something about your educational background please?

A. Yes. I hold a B.A. from Stetson University from 1969, major—double major, Education and Psychology. I hold a Master's Degree in Child Development from the University of Miami, Miami, Florida in child development. I hold a Graduate Certificate in Counselling from Old Dominion University in Norfolk, Virginia. I hold eighteen graduate hours in Family and Community Counselling from the University of Maryland, College Park and I have a Master's in Clinical [1-36] Social Work from the University of Maryland, Baltimore.

Q. Do you hold any certifications or licenses from the State of Maryland?

A. Yes I do. I am a Licensed Certified Social Worker, Maryland License 4776.

Q. Can you tell the Court very briefly as a Licensed Certified Social Worker how you're involved with children

who have been subjected to abuse. In other words, what do you actually do?

A. In my private practice, you mean, private practice.

Q. Yes. Well, what do you do now in that regard, tell the Court please?

A. I am in private practice. About sixty percent of the children that I see in private practice have been sexually abused. I also am a Consultant to Anne Arundel County Department of Social Services in the Silent Victim Program. I do treatment with children there. I am also involved in the training of police officers for Anne Arundel County Department—Police Department.

Q. And in the course of your work do you have occasion to be able to determine the emotional state of the young people that you work with?

A. Yes I do.

MR. WARFIELD: Your Honor, I would submit the witness as an expert at this time.

[1-37] MR. KOLODNER: Objection. I don't know what she's an expert at—to.

THE COURT: Specifically as an expert and competent to render an opinion concerning a particular subject matter which is——

MR. WARFIELD: Well—I'm—all right and the subject matter would be the emotional state of the children that—and I will follow that up with the specific children in this particular case that she is working with in terms of her therapy sessions with the children involved. So I'm submitting her as an expert to render an opinion concerning the emotional state of the individuals and their ability to testify either in court subject to a face to face confrontation with the alleged abuser as opposed to via the closed circuit television.

MR. KOLODNER: Objection, I don't think the foundation has been laid.

MR. WARFIELD: I think it's subject to his questioning.

THE COURT: Would you like to question the witness.

MR. KOLODNER: Yes.

THE COURT: Go ahead, concerning whether or not this Court should permit her to render that opinion. You can question her concerning her background or whatever—however you feel it appropriate.

[1-38] **VOIR DIRE EXAMINATION**

BY MR. KOLODNER:

Q. Now you have a B.A. from Stetson University?

A. Yes.

Q. And your Master's is in what from Miami?

A. Child Development.

Q. What courses did you take at Miami?

A. I had to take Child Development ages zero through two, five through seven, adolescents up to eighteen years old. I took Child Psychology. I had to take Personality Adjustment. I had to take Family Psychology. I took a course in Diagnosis and Treatment——

Q. A course and how many hours was that course?

A. That was a three hour course.

Q. Three hours in Personality Adjustment, okay, and what other—what else did you take at Miami?

A. I took courses in treating learning disabilities. I took——

Q. What courses did you take in learning disabilities?

A. I had approximately twenty hours of learning disabilities, diagnosis and treatment of children with learning disabilities.

Q. Twenty hours of—what is learning disabilities. What would you characterize as learining disabilities?

A. I would say a child has learning disa—there [1-39] are many diagnoses that come under learning disabilities. For instance one would be an attention deficit disorder with hyperactivity that would cause a child not to perform at school. There are many things that could fall under learning disabilities, dyslexia. I've given you two examples there. I could go through, you know, different categories of DSM-III Diagnosis if you want.

Q. And you have twenty hours of that, is that correct?

A. Yes.

Q. All right and what other training do you have?

A. I hold a Master's Degree in Clinical Social Work in which I have taken treatment. My speciality was in children. I did my internship dealing with children during that time which was a year's internship.

Q. Where was the internship?

A. I did part of it at the Y.W.C.A. Women's Center dealing with family and children there. I did part of it at Protective Services in Anne Arundel County in a Child Abuse Center. I have also—for Anne Arundel County I was appointed Child Protection Coordinator by County Executive James Lighthizer. I wrote a Grant—I wrote a three hundred and fifty thousand dollar Grant that establish a child sexual abuse and treatment program in Anne Arundel County and I established—I worked with twenty-seven agencies [1-40] establishing a treatment program and a prevention program in Anne Arundel County which is currently still in effect.

Q. Have you taken any medical courses?

A. Yes I have, in fact. I've taken a Psychopharmacology course for children.

Q. How many hours was that?

A. That was a Continuing Education Course beyond my Master's.

Q. How many hours was that?

A. That was a week's training.

Q. One week's training.

A. Um-hum.

Q. That was a medical course?

A. Yes.

Q. At a medical——

A. The University of Maryland—it was offered by the University of Maryland Medical School.

Q. And the medical course was one week, is that correct?

A. Yes.

Q. What other medical courses have you taken?

A. I have not, since I was not in medical school.

Q. Okay, so you have no training medically other than this one week of medical course, is that correct?

A. No. I did have training with Doctor Hank Giarretto [1-41] who established the Child Sexual Abuse Treatment Program in Santa Clara, California and part of that training with Doctor Giarretto was to deal with some of the physical indicators that children exhibit when they have been sexually abused.

Q. How long were you with this training group?

A. I was with Doctor Giarretto—I still consult with Doctor Giarretto. I had an intensive one week training from eight to five everyday with Doctor Giarretto.

Q. How do you spell his name?

A. G.i.a.r.r.e.t.t.o.

Q. Where is he located?

A. He's in Santa Clara, California with his wife Anna Giarretto and they have established a program, the Child Sexual Abuse Treatment Program——

Q. And you had one——

A. —which is nationally known.

Q. And you had one week training?

A. Yes. I've also attended the Chesapeake——

Q. Just I—I just didn't hear, you said one week training?

A. One week training with Doctor Giarretto and I've received supervision on cases from him.

Q. And that is the extent of your medical background, is that correct?

[1-42] A. Medical, yes. In child sexual abuse I have had further training.

Q. Okay, what is your training in?

A. I have been trained through Chesapeake Institute in Kensington, Maryland which specializes in the treatment of children and offender treatment.

Q. Chesapeake Institute, where are they located?

A. Kensington, Maryland.

Q. How long did you go to——

A. (Inaudible)

Q. How long did you go to Chesapeake Institute?

A. There have been—there have been various trainings with them. One day seminars. I've attended at least six of those from eight in the morning till five, treatment of children.

Q. Six, you—just a moment. You're going a little too fast for me. You attended six one day seminars?

A. No audible response.

Q. Okay, and what other training?

A. I've received training from the Virginia Beach Department of Social Services, their Sex Abuse Unit.

Q. What kind of training was at Virginia Beach?

A. I went down as a Consultant when I was establishing a program in Anne Arundel County and I spent a week there from—again from eight to four everyday with the [1-43] Child Abuse Unit observing their treatment, consulting, receiving training and at that time Ken Lanning of the F.B.I. was doing some training and coordination of that.

Q. And you spent one week there?

A. Yes. I have also received training from the Anne Arundel County Department of Social Services. I was a Protective Services Supervisor for two years and that entailed supervision on a weekly basis of approximately three hours for two years, supervision that I received from the Assistant Director on child abuse cases.

Q. Do you have any courses in Psychiatry?

A. No, in Psychology but not in Psychiatry.

Q. And you have no medical courses?

A. None other than what I've told you.

MR. KOLODNER: I still object to the qualifications to testify on this subject.

THE COURT: Would counsel like to elicit any other questions from the witness with reference to her background qualifications?

MR. WARFIELD: Just clarification.

VOIR DIRE EXAMINATION

BY MR. WARFIELD:

Q. Primarily your work is with children, is that correct?

A. Yes.

[1-44] Q. And as such you spend a great deal of time with the children, is that correct?

A. Yes.

Q. And——

A. I do individual and group therapy with children.

THE COURT: I'm sorry ma'am, I didn't hear you.

A. I do individual and group therapy with children who have been sexually abused.

Q. And you are—how long have you in fact been doing this? Just when did you begin?

A. It goes back to 1977 when I worked as a Sexual Assault Counselor in Tidewater Rape.

Q. And in doing this you have—you're in a position to——

MR. KOLODNER: Objection to the form of the questions. He's been leading his——

THE COURT: Don't lead the witness. I'll sustain the objection, rephrase the question please.

Q. Are you in a position to judge the emotional state of the young children that you deal with on a day to day basis?

MR. KOLODNER: Objection.

MR. WARFIELD: I think this goes to——

THE COURT: Again subject to my ruling on her ability to do so——

[1-45] MR. KOLODNER: Yes sir.

THE COURT: —I'll permit her to answer the question——

MR. KOLODNER: That's right.

THE COURT: —overruled.

MR. WARFIELD: I think it goes to qualifications because it's the core of the issue.

THE COURT: Well, I guess that's the ultimate decision I need make, but she may answer the question. You may answer the question.

A. Yes, I believe I am qualified because of my background and training.

Q. Well, I really wasn't asking—I was asking if you were in a position to judge the emotional state of the children?

A. Definitely.

Q. I'm not asking for you to state your own qualifications obviously?

A. No.

Q. But you are in a position to on a day to day basis observe and to recognize the emotional state of the children that you're dealing with, is that correct?

A. Yes.

MR. WARFIELD: All right. Your Honor, based on her training and background and for the limited purpose of [1-46] this motion, I submit this witness is an expert

for her ability to be able to judge the emotional state of the individuals involved and to render an opinion as to their ability to testify in court or not to testify in court.

MR. KOLODNER: I object to it.

THE COURT: As I understand, the evidence is that this witness is a--has a Master's Degree in Clinical Social Work, that she's a Certified Social—she's a Licensed Certified Social Worker, that she counsels children concerning child abuse, that she sees children in group and individual therapy and that she's able to, based upon her experience with children, to be able at a given point in time determine their emotional status. Assuming that it is established that the witness has some familiarity with children who are the subject matter of these proceedings. I'm satisfied that she is competent to render an opinion concerning whether the nature of a particular child's testimony in the courtroom will result in the children suffering emotional distress to the extent that they cannot reasonably communicate. So I'll permit her and the Court rules that she is qualified to render an opinion concerning that subject matter.

MR. WARFIELD: Thank you Your Honor.

DIRECT EXAMINATION

BY WARFIELD:

[1-47] Q. Mrs. Hoover, during the course of your employment have you had occasion to come in contact with a young man by the name of Brian Endres?

A. Yes.

Q. And perhaps you could spell that for the Judge?

A. E.n.d.r.e.s.

Q. And was he a referral from Howard County?

A. Yes, from the Sexual Assualt Center.

MR. WARFIELD: I might point out for the record, Your Honor, that he is the subject matter of one of the indictments in this case.

THE COURT: Of one of the indictments.

• • •

Q. Starting with Brian Endres, can you tell the Court how much time that—from your initial consultation with Brian that you've spent with him?

A. Yes. My initial consultation was on August the [1-48] 5th. I have had fifteen sessions with Brian. The sessions range anywhere from an hour to an hour and a half.

Q. And without stating specifically what was said, can you tell the Court just basically the subject matter under investigation or discussion or the subject matter of the therapy sessions.

A. The subject matter of the therapy sessions had to do with sexual abuse of Brian by Mrs. Craig.

Q. All right. Based upon your contact with Brian and your expertise that's already been acknowledged by the Court, do you have an opinion as to Brian's ability to come into this courtroom and testify face to face with Mrs. Craig as opposed to being permitted to testify by way of closed circuit television outside of the courtroom? Do you have an opinion?

A. Yes.

Q. All right and can you tell the Court again based upon your expertise in the area and based upon your contact with Brian Endres, what that opinion is?

A. I believe that Brian could not testify in an open courtroom such as this. That it would cause him severe emotional distress. Brian experiences panic disorders, night terrors and this child's level of anxiety is increasing. I

have concerns this child may decompensate in an open courtroom situation.

[1-49] Q. And how would that affect his ability to communicate if he were in the courtroom?

A. I don't think he would be able to communicate exactly what happened to him.

Q. And that would be in a face to fact context as opposed——

A. Yes.

Q. —to closed circuit, is that correct?

A. Yes.

MR. WARFIELD: I have no further questions, counsel. I submit, Your Honor, on the basis of the testimony. I believe she's subject to cross-examination on——

THE COURT: With reference to that one child.

• • •

[1-50] THE COURT: Cross.

[1-51] **CROSS-EXAMINATION**

BY MR. KOLODNER:

Q. Both of these children were referred to you by the Sexual Assault Center?

A. Yes, Howard County Sexual Assault Center.

Q. And both would have the experience, the exact same problem if they were to testify in the courtroom, is that correct?

A. They would both experience a high level of anxiety. It may come out in different behaviors but basically they would exhibit an extreme amount of anxiety.

Q. How would that anxiety show itself?

A. When Todd discusses the incidents, Todd stutters, he crys, he withdraws, he is scared to death. There is fear, he trembles. Brian has at times withdrawn into a fetal position when discussing the events. Again, the level of anxiety has become extremely aggressive. So the anxiety's displayed in different ways with these children. Tearfulness.

Q. Would that—the reaction occur if she would—if either of these children would see Mrs. Craig walking on the street or is it just in the courtroom?

A. No, I'd imagine it would happen on the street. Both children expressed the fear that they did not want to see Mrs. Craig again and have asked me if they will see Mrs. Craig again

[1-52] Q. So if they ever had any contact with Mrs. Craig that would be the reaction in your belief?

A. In my belief, yes, that these children would have an extreme anxiety reaction to that or a face to face confrontation, yes sir.

Q. In order to clarify it in my own mind, if Mrs. Craig would pass them on the street, you feel as though that there would be a severe reaction as to each of these children, is that correct?

A. I believe both children would have a reaction. I believe—you're talking about two situations, one out in public and one in the courtroom where there's more stress in a courtroom. I believe in both situations they would have a reaction to seeing Mrs. Craig. Both children are experiencing night terrors, nightmares about seeing Mrs. Craig have asked me and the police officers involved in this case not to see Mrs. Craig.

Q. So they've asked most of the people that they've come in contact with regarding this matter that they didn't want to see Mrs. Craig, is that correct?

A. Yes.

Q. Who was present when you would have a session with the first child?

MR. WARFIELD: Excuse me. I didn't hear that.

Q. Who was present?

[1-53] THE COURT: Who was present when she consulted with the first child, Brian?

MR. WARFIELD: Objection, that's beyond the scope. I think we're getting into the area that we discussed in chambers in terms of the other—the questioning and all that sort of thing. I don't believe that's relevant to these proceedings.

THE COURT: Well, I believe the bases for this witness' opinion and to the extent that she made certain observations which lend themselves to her opinion it seems to me it's relevant. So for that limited basis I'll overrule the objection. You may answer it.

Q. Officer Beth Healy was present in sessions with both Brian and Todd where they both expressed they did not want to see Mrs. Craig and they were fearful of Mrs. Craig.

Q. Does that also apply to Todd Fussell?

A. Todd Fussell, yes. In both instances, Officer Beth Healy was present and heard the children say that they wanted for her to protect them against Mrs. Craig and they asked some questions about it.

Q. Did Officer Healy ask any questions while you had this session——

MR. WARFIELD: Object——

Q. —of the children?

MR. WARFIELD: —I'm going to object, Your Honor, [1-54] again I don't think that's relevant to this witness'

qualifications, number one, and number two, to this witness' ability to be able to judge the issues at hand. We're getting beyond that and I don't—that's precisely what we address——

THE COURT: I would agree, I would agree. The basis of this witness' observations of these children is the predicate for her opinion. The extent to which she accurately saw, observed, listened to, perceived statements, demeanor of the children is relevant. The extent to which others may have seen her with these children is relevant, but that's it, not what those other's said. The accuracy of this witness' observations is relevant. So to the extent that others could have seen what she saw or heard what she heard, that's relevant, but the extent to which the others participated or questioned or inquired of at this juncture for this purpose I don't see as relevant. That was long winded but do you see the gist of what I'm saying?

MR. KOLODNER: Yes sir.

Q. During these sessions did you ask questions of each child?

A. Yes.

Q. Besides Officer Healy was anyone else present?

A. I believe in two sessions with Brian Endres I had [1-55] the one-way mirror that we use and on the other side of the one-way mirror, was a parent and her attorney and observed the session.

Q. A parent and an attorney?

A. Yes.

Q. Brian Endres' mother and Brain's—and her attorney observed. Any parent is welcome and I would make this offer to any parent that they can or—that I have a one-way mirror if they would like to observe the session and this goes for any child that I work with.

Q. Was the attorney present in the room while you were talking to the child?

A. No.

Q. Was he brought to the interview by the attorney?

A. No.

Q. Did the attorney arrive later?

A. Yes.

Q. How often was the attorney there?

A. Once.

Q. Did Todd Fussell also have an attorney present?

A. No.

MR. KOLODNER: All right, I have no further questions sir.

THE COURT: Any redirect.

MR. WARFIELD: No sir.

[1-56] THE COURT: Thank you ma'am, you may step down.

MR. WARFIELD: Your Honor, on the basis of the testimony, I would submit that at this point if I may be permitted on a witness by witness basis. The State has no further testimony in support of the motion pursuant—the motion for closed circuit as it relates to Brian Endres and Todd Fussell. At this time I would move—or I would ask the Court to rule that in both of those cases pursuant to Section 9-102, Courts and Judicial Proceedings Article that any testimony whether it be in their own case or as witnesses in another case be permitted by way of the closed circuit television as provided for in the Statute.

THE COURT: I understand the defendant would reserve the right to argue the constitutionality of this par-

ticular process. May I inquire, does the defendant wish to introduce any evidence concerning this issue.

MR. KOLODNER: No, but I would like to renew—do I have a continuing objection to this.

THE COURT: Well, I haven't ruled on the appropriate—two-fold. As I see it there's an evidentiary hearing. It seems to me you each have a right to offer evidence on this particular issue. As I understand it, the State submits that it is appropriate for me to receive testimony by way of closed circuit t.v. concerning these two children. As I understand it, the defendant doesn't [1-57] wish to offer any evidence on that issue but would reserve the right to argue, one, that the statute's not constitutional and I guess, two, whether based on the evidence presented I should allow or should not allow. Let me reserve ruling on that issue and put it all off to the end, but we have—but we have—both parties have presented all the evidence they're going to present with reference to the appropriateness of this Court receiving closed circuit t.v. with reference to these two children.

MR. KOLODNER: Yes sir.

THE COURT: Good and then I'll reserve ruling on whether or not it's appropriate and/or constitutional for me to do so.

MR. WARFIELD: Very well Your Honor. All right. The State would then call for the next witness Your Honor, Mary Burke please.

(Witness Sworn)

THE CLERK: State your name and address for the record please.

THE WITNESS: My name is Mary F. Ellis (inaudible).

THE COURT: Ma'am, I'm sorry, Mrs. Burke. You're going to have to speak up louder. I'm having a tough time hearing you.

THE WITNESS: My name is Mary F. Ellis, spelled with an "E" Burke and my address is 1115 Elkridge Linthicum [1-58] Road, Linthicum, Maryland.

MR. WARFIELD: Mrs. Burke, as I told the last witness and I believe you were in court, please address your responses to the Judge and I will be asking you the questions.

MARY F. ELLIS BURKE,

a witness called on behalf of the State, having been duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Can you tell the Court your—the nature of your employment please?

A. Yes. I work as a Child Therapist with the Howard County Sexual Assault Center.

MR. KOLODNER: I'm sorry, I could not hear the answer.

THE COURT: Can you turn the mike on Madam Court Reporter. Maybe if you spoke right into the mike. I also didn't design the accoustics in this courtroom either.

(Reporter's Note-microphone in front of the witness not working at this time, not known until tested after witness left stand)

A. I work as a Child Therapist with the Howard County Sexual Assault Center.

[1-59] THE COURT: Can you hear Mr. Kolodner.

MR. KOLODNER: I heard that, yes sir.

THE COURT: We can hear you clearly.

MR. KOLODNER: Thank you.

MR. WARFIELD: Fine.

BY MR. WARFIELD:

Q. And can you please tell the Court your educational background and training and if you could be as thorough as possible, perhaps we can avoid some further questioning.

A. I hold a Bachelor's Degree in Child Behavior and Development from the University of Iowa——

MR. KOLODNER: I'm getting—can't hear now. Perhaps I'll move over to where she is.

THE COURT: Sure, why don't you.

MR. KOLODNER: Would that bother you.

THE COURT: It won't bother me. If it bothers—I'm sorry.

MR. KOLODNER: I'll just stand here.

THE COURT: Why don't you have a seat over there Mr. Kolodner. Just don't look at counsel's notes on the trial table in front of you.

MR. KOLODNER: I wouldn't dare do that.

THE COURT: I've heard a concern of counsel that jurors might see their notes, but I've never had them argue [1-60] to me that other lawyers, opposing lawyers could see their notes in this courtroom. Go ahead Mrs. Burke, I'm sorry.

MR. WARFIELD: Yeah, if we can start over please sir.

A. I hold a Bachelors Degree in Child Behavior and Development from the University of Iowa in 1973. I hold

a Master's Degree in Counseling Psychology and Human Development from Antioch University in 1981. I have training in working with sexually abused children and adults. Four and a half years of working in Anne Arundel County's Sexual Assault Center. A year as a counselor with Prince George's County Sexual Assault Center and approximately fifteen months with the current Howard County Sexual Assualt [sic] Center. I've received as I said training at Anne Arundel from Brenda Robinson who was the Clinic Director at Prince George's, from Dr. Linda Set who's a Clinic Director under Dr. Cohen, Home Psychiatry and I'm currently receiving clinical supervision from Dr. Gladys Sweeny on a bimonthly basis.

Q. All right, and are there any other courses that you've attended, training type courses or any other educational facilities that you've attended other than what you've already testified to which would—which qualify you in this particular area?

A. I've attended several workshops which have been [1-61] sponsored by various agencies. Some of them are more or less relevant to the immediate issue of child sexual abuse and they all deal with children and children's rights issues. Some are specific to child sexual abuse issues. Some are clinical questions of issues.

Q. All right, and as a practical matter, how long have you been working with abused children?

A. Well, I guess intermittently it began when I was with Anne Arundel. It began in 1981 through the present.

Q. Okay, from 1981 through the present and you are—your work week so to speak is—how many hours do you devote to this endeavor during the week?

A. Well, I'm currently thirty-five hours that I'm paid and the rest is comp. time. It's a full-time position.

Q. And what amount of that time is spent with children?

A. One hundred percent of my time is spent with children and their families. I provide support and services, individual counseling and group for the parents and secondary victims which would include brothers and sisters of the child victims.

Q. And in what percentage of these children is there an allegation of abuse?

A. One hundred percent of the children come to the sexual assault center because there's a suspicion or an [1-62] allegation of sexual abuse.

Q. So you are working specifically with allegations of sexual abuse as they pertain to children, is that correct?

A. Yes.

Q. All right, and how long have you been with the Howard County Sexual Assault Center?

A. Approximately fifteen months.

Q. Fifteen months and prior to that you were with Anne Arundel County, is that correct?

A. Prior to that I was with Prince George's County.

Q. I'm sorry, Prince George's and then prior——

A. That was about a year and before that I was with Anne Arundel.

Q. And when you were with Prince George's County and Anne Arundel County were you doing the same thing that you're doing now, primarily?

A. Anne Arundel would have been less—I guess it was less in the way of one on one therapy. It was more crisis intervention then [sic] corrective therapy which would be on a short term basis for six to twelve months.

Q. And what is your official title if there is such a thing? What is your—what is your specific job title?

A. My job title is Child Therapist.

Q. Child Therapist.

MR. WARFIELD: All right, I would submit to [1-63] counsel at this point, Your Honor, on the basis of qualifications.

THE COURT: Mr. Koloder, would you like to question the witness?

MR. KOLODNER: Yes.

VOIR DIRE EXAMINATION

BY MR. KOLODNER:

Q. You say you received your B.A. in Child Behavior, where was that?

A. It's Child Behavior and Development at the University of Iowa.

Q. How long did you go there?

A. How long did I go to the University of Iowa?

Q. Yes.

A. I went there two years.

Q. Two years and what shcool did you go after that?

A. After I graduated from the University of Iowa?

Q. Yes, yes.

A. Antioch.

Q. How long did you go there?

A. For approximately two years.

Q. And since that time what do you do or what is your function in Howard County, for instance?

A. My function is to provide evaluations and to provide counseling to children who are victims of child [1-64] sexual abuse and their families.

Q. Do you have any medical training?

A. I don't—I never took medical courses. I have medical training when I was at the Prince George's County Sexual Assault Center. I assisted the interns and physicians in examinations of victims. That was a part of evidence production.

Q. But you have no medical training, is that correct?

A. No sir. I have no medical training (inaudible).

Q. You have no training in Psychiatry?

A. No, I do not.

Q. So what you do have is a B.A. in Child Behavior, is that correct?

A. Behavior and Development.

Q. Behavior and Development and what do you do at Howard County? When someone files a complaint you check to see if the child has been abused?

A. Yes.

Q. And then what do you do?

A. Then I provide therapy and counseling services to the child to allow him to (unable to hear)——

THE COURT: Mrs. Burke, I'm sorry, you're not—just speak into the mike. I'm sorry, you're not being heard by the court reporters. I can hear you and I think counsel can hear, but the court reporter can't hear you. Don't [1-65] worry about me. You just talk into that microphone. If counsel can't hear you somebody will tell me. If the court reporter can't hear, she'll tell me.

Q. Okay, now what was your answer.

THE COURT: The question is what do you do at the Howard County?

Q. What was your answer?

A. I don't remember what my answer was specifically. What I do is I have children who are referred to me. I meet with those children. I interview them and their families. I provide evaluations in terms of observation of their behavior, assessment of whether or not the behavior that I observed would be consistent with those of a child that could be sexually abused, provide follow-up counseling services to those children and their families until they establish a degree of coping within their lives.

MR. KOLODNER: Sir, if this is—do you have anything else to ask her?

MR. WARFIELD: On this, no.

MR. KOLODNER: Well then, I would object to her qualifications then.

THE COURT: Pardon me gentlemen, let me just ask a question or two of the witness.

VOIR DIRE EXAMINATION

BY THE COURT:

[1-66] Q. Are you licensed by the State in any fashion ma'am?

A. No, I'm not.

Q. You said you had a Bachelor's Degree from the University of Iowa. You have a Master's Degree also?

A. Yes.

Q. In what field?

A. Counseling Psychology and Human Development.

Q. Yes I do.

Q. When I say counsel, you give them some guidance, try and help them out, is that what you do?

A. That's part of what I do, yes.

Q. Sure. Can you perceive distress in the children who come before you? I mean, can you observe it?

A. Some children manifest distress so it can be outwardly observed, others do not.

Q. But based upon your training if a child exhibits distress while that child's in counseling—in consultation or in therapy, can you perceive it?

A. Yes.

Q. And how do you perceive it?

A. We perceive it in relationship to a normal description for that child's behavior, in terms of you reference it agianst [sic] a normal population of children of that particular age and development. You listen to their [1-67] speech. You listen to vocabulary development, watch physical manifestations, you watch their behaviors in the session, you listen for crying, you listen for a disruption of the speech patterns. Many of these assessments are used to determine whether a child is anxious or fearful or in stress.

THE COURT: Gentlemen, you would like to—first of all, have you any other questions of the witness, excuse me.

MR. WARFIELD: We're on qualifications at this point.

THE COURT: On qualifications.

MR. WARFIELD: I don't have any further. Just a follow-up to the Court's questions.

VOIR DIRE EXAMINATION

BY MR. WARFIELD:

Q. Mrs. Burke, you said you're not licensed. You're not—I'll ask it in a nonleading fashion. What if any licensing

requirements are there for you to function in the area that you're functioning now?

A. To my knowledge there are no licensing requirements and there is no licensing available in the State of Maryland for people who hold a Master's Degree in Counseling Psychology.

MR. WARFIELD: I would submit on her qualifications. Her lack of licensing, Your Honor, is not something—in [1-68] other words, she—her thing that she does, does not require—there's no license required for that, for her to function as such. I would submit her as qualified.

THE COURT: Mr. Kolodner, would you like to be heard on the issue of her qualifications?

MR. KOLODNER: Yes. I object to her qualifications to determine whether or not she can voice an opinion as to whether or not there would be trauma, trauma, to a child testifying in a courtroom and I think that's what she would have—she would have to give a medical opinion and I don't think she's qualified to do that. I don't think she—she has nothing more than a B.A. in Child Therapy.

THE COURT: Thank you sir. I'm satisfied from the interrogation of the witness that by virtue of her training and background and her present employment that she is competent to testify with reference to the issue of whether a particular child who might be called to testify in this proceeding might suffer serious emotional distress so that the child could not reasonably communicate in a courtroom and I'll permit her to render an opinion concerning that subject matter assuming she's familiar with a child that might be relevant to these proceedings.

DIRECT EXAMINATION

BY MR. WARFIELD:

[1-69] Q. Mrs. Burke, could you please tell the Court what if any children were referred to you as a result of alle-

gations of abuse at the Craig's Country Day—let me rephrase that Your Honor. I think for expedience if I could name various children it might be more beneficial. During the course of your employment have you come in contact with a Brooke Etze?

A. Yes.

THE COURT: I'm sorry.

MR. WARFIELD: Brooke Etze, Your Honor.

THE COURT: E.t.z.e.

MR. WARFIELD: Yes.

THE COURT: Thank you.

Q. Have you come in contact with a Justin Peeples?

A. Yes I have.

MR. WARFIELD: P.e.e.p.l.e.s.

Q. And a Jessie Sue Smith?

A. Yes I have.

• • •

[1-72] **DIRECT EXAMINATION CONTINUED**

BY MR. WARFIELD:

Q. As it relates to Brooke Etze, can you tell the Court how much time you spent with her?

A. I've seen Brooke approximately twenty sessions and a session is—varies from one to one and a half hours.

Q. Can you tell the Court without going into any specifics what the subject matter of the sessions was?

[1-73] A. Yes. I'm seeing Brooke on issues relating to alleged sexual abuse by Mrs. Craig.

Q. Have you as a result of these sessions been in a position to determine her emotional state as it relates to her being able to relate the incidents involved?

A. Yes.

Q. Have you formed—based upon your training and expertise have you formed an opinion as to her ability to be able to come into a courtroom during the course of these trials and testify face to face with Mrs. Craig?

A. Yes I have.

Q. On the basis of your training and expertise and contact with Brooke Etze can you tell the Court what that opinion is?

A. Yes. My opinion is that it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents. I believe it would also be difficult for her because of her age to sit in front of a group of strangers whether they be Mrs. Craig or any other person and discuss the allegations. A second factor would be (unable to hear witness) she perceives herself as having been threatened. She truly believes that those threats will be carried out against her.

Q. By whom is she perceiving the threats?

A. She's perceiving that she was threatened by Mrs. [1-74] Craig and that she feels that her life is in jeopardy and part of her family and the household pet and I find that it would be very difficult for her to sit in front of this person and be able to tell what she thinks happened to her.

Q. And can you characterize that in terms of emotional distress in the courtroom and ability to communicate in the courtroom?

A. Yes. I think that Brooke coming into the courtroom where she would be faced with the alleged perpetrator and

a group of strangers would be unable to talk about what happened to her. She currently in preparation for the pending hearings is experiencing disruption in her breathing which is definitely manifesting distress and fear and anxiety visible in a physical manner and also an emotional manner.

MR. WARFIELD: Your Honor, if I could then go on to the next one rather than let counsel——

THE COURT: Sure and then we'll let counsel—would that be appropriate, just question the witness——

MR. WARFIELD: —rather than go one at a time.

THE COURT: Sure, go ahead.

Q. As to Justin Peeples, how much time have you spent with him?

A. I've seen Justin approximately eighteen sessions.

Q. And again are they in the same duration range as [1-75] the other one?

A. Yes.

Q. And can you state the subject matter of the sessions with Justin Peeples?

A. Yes. I'm seeing Justin because there are allegations of sexual abuse taken by Mrs. Craig.

Q. And in the course of these sessions have you—are you in and have you been in a position to judge and to gauge his emotional state as it relates to relating the incidents involved?

A. Yes.

Q. Do you have an opinion based upon your expertise and your observations of Justin Peeples as to his ability to testify in the courtroom concerning the matters in this case as opposed to outside of the courtroom via closed circuit television?

A. Yes.

Q. All right, and what is that opinion, again, based on your training, expertise and your contact with the young man involved, Justin Peeples?

A. For Justin, I believe that Justin would be, once again, he would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure.

Q. He sees as what, I'm sorry.

[1-76] A. As a threatening figure. Justin has had difficulty talking to me about what happened. He's had difficulty talking—making his disclosures to other people including police and protective services. He tends to change the subject which is his manner of avoiding the issue. He becomes agitated and depressed. He bursts into tears and would be unwilling or unable at that point to proceed.

Q. All right, and as to—well, can you relate—can you relate that to the—to emotional distress and to ability to reasonalby [sic] communicate?

A. Yes. I think that it would be very—it would impair his ability to communicate. My feeling is that if the goal would be to allow this child to be heard, to maximize that opportunity you would provide him with privacy in his disclosure and to remove the threatening agent which he perceives as Mrs. Craig.

Q. All right. As to Jessie Sue Smith, how much time have you spent with her?

A. I've seen Jessie approximately thirty-six sessions.

Q. Thirty-six sessions and the duration of those sessions?

A. Again, approximately an hour to an hour and a half per session.

Q. During the course of your meeting with Jessie Sue [1-77] Smith, have you had occasion to observe her emotional state as it relates to her ability—as it relates to her relating the incidents involved?

A. Yes.

Q. All right, let me back up one. What was the subject matter of the sessions with Jessie Sue?

A. The sessions were dealing with Jessie's allegations of sexual abuse of herself by Mrs. Craig.

Q. And what if any portion was devoted to allegations concerning Jamal Craig?

MR. WARFIELD: I might point out for the record, Your Honor, that there are two cases involving this individual, one against Jamal and one against Mrs. Craig, so I would ask the Court to take into consideration the dual—a request for a dual ruling as it relates to each case. So we have a single victim of two—of two separate individuals here and a ruling would be requested in each case, just for the Court's understanding.

Q. Were there—what if any subject matter concerning allegations of Jamal Craig?

A. Yes, there were allegations of sexual abuse by Jamal in a large percentage of the sessions with Jessie. We also went over those allegations.

Q. All right, and as they relate to Mrs. Craig?

A. A smaller percentage but again there were allega-
[1-78] tions.

Q. And do you have—and based upon the time spent with her, with Jessie Sue Smith and your expertise, do you have an opinion as to her ability to testify in either of those two cases in court regarding those allegations?

A. Yes.

Q. Okay, and again based on your expertise and your contact with Jessie Sue Smith as to Mrs. Craig can you tell the Court what that opinion is?

A. As to Mrs. Craig, she perceives herself, again, as her life has been threatened, that of her parents and her sibling too. She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations.

Q. How does that relate to emotional distress?

A. Well, Jessie has been in therapy for over a year at this point trying to deal with the issues that have been surfaced regarding the stress and disruption of her life emotionally. I think that that would be a step-back for [1-79] Jessie to have to face this person. I think that her fear, again, that her life may be jeopardized or that of her family, when discussing it, was a problem to her. I feel it would cause her not to share that information.

Q. Now, as it relates to Jamal Craig, do you have an opinion on her ability to be able to come into the courtroom and testify as it relates to Jamal Craig?

A. Yes.

Q. All right, and what is that opinion?

A. I think it would be very difficult again for this child to come into the courtroom and discuss what happened to her. I think, again, it would be difficult because of her age, because of the sensitive nature of the allegations, the invasion relative to her body and privacy.

Q. And can you describe based upon your training and experience and also your contact with her what her emo-

tional state would be if she were required to come into the courtroom and testify against Jamal Craig in court?

A. I think she would become anxious, agitated, fearful. I think those things could contaminate her testimony.

Q. What would the result be on her ability to communicate?

A. I think that would constrict here [sic] ability to communicate.

[1-80] Q. And that would be as it relates to Jamal Craig, is that correct?

A. Yes.

* * *

[1-82] **CROSS-EXAMINATION**

BY MR. KOLODNER:

* * *

[1-83] Q. Well, let's talk about Brooke Etze, what would that child do? What do you think the reactions as to that child would be?

A. I think that Brooke would probably stop talking and she would withdraw and curl up.

Q. Would that occur also if she would just see Mrs. Craig in a room someplace or walking on the street?

A. I think that would vary if Brooke's parents were available and if Brooke felt that she could escape. I think that you might see a variable response.

Q. Would become dispondent[sic], is that what you said?

A. No, no, I didn't say that. I said I—I said that I thought that the response could vary if Brooke's parents were present, if there were an opportunity for her to

escape, that she might or might not respond in the way that you suggested.

Q. And now as to Justin Peeples, what do you think the reaction would be if she were brought in court—if he were brought in court?

A. If Justin was brought into the courtroom?

Q. Yes.

A. Well, I think that Justin would become highly agitated, that he may refuse to talk or if he did talk, that he would chose [sic] his subject regardless of the questions.

Q. What do you think that his reaction would be if [1-84] he were just—just came in contact in an ordinary manner with Mrs. Craig such as in a room or on the street or at her home?

A. I don't think you would ever find Justin voluntarily walking into her home if he knew in advance that's what he was doing.

Q. He would refuse to go to her home?

A. Yes, if he had the opportunity to refuse, he would.

Q. Going back to Brooke would she also refuse to go to Mrs. Craig's home?

A. I would imagine that she would. Again that's real speculative. I never asked her that question.

Q. What do you think the reaction of Jessie Sue Smith would be if brought into the courtroom to testify?

A. I think that she would probably—Jessie would probably look around and become extremely timid and unwilling to talk.

Q. What would her reaction be, do you believe, if she had contact with Mrs. Craig outside of the courtroom at her home—at Mrs. Craig's home for instance—if taken to her home?

A. I—again, I've had no opportunity to, you know, that's speculative. I think that that situation would never occur.

[1-85] Q. She would refuse to go there if told, is that what you would believe?

A. Yes.

* * *

[Certificate of Court Reporter omitted in printing]

[2-1]

IN THE CIRCUIT COUR[T]
FOR HOWARD COUNTY, MARYLAND

Criminal Case Nos.
15458, 15459, 15460, 15461, 15462, 15463, 15464, 15465, 15466, 15467, 15469, 15625 and 15737

Criminal Case Nos.
15468 and 15568

STATE OF MARYLAND

Vs.

SANDRA A. CRAIG

And

JAMAL D. CRAIG

Defendants

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motions)

VOLUME II OF II

Howard County, Maryland
Wednesday, January 21, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.

APPEARANCES:

For the State:
A. G. Warfield, Esquire

M. C. O'Donnell, Esquire

For the Defendant:

F. Kolodner, Esquire

Janet Falkenstine-Secretary/Court Reporter
Circuit Court for Howard County
8360 Court Avenue
Ellicott City, Maryland 21043

[2-7] • • •

MR. WARFIELD: Thank you Your Honor. Again, renewing the situation where we were yesterday, this is a continuation of the State's motion on closed circuit television and in that—in pursuance of that particular motion we would call Dr. Gladys Sweeney as our next witness.

(Witness Sworn)

THE CLERK: Would you state your name and address for the record please.

THE WITNESS: My name is Gladys Acevedo Sweeney and the address is 6823 Grimes Golden Court in Columbia, 21045.

MR. WARFIELD: Dr. Sweeney, I would ask you to—I will be asking you certain questions and defense counsel will ask you certain questions and if you could direct your responses to Judge Kane, I would appreciate it, and try to use the microphone as best you can.

GLADYS SWEENEY,

a witness called on behalf of the State, having been duly sworn, took the stand and testified as follows:

[2-8] **DIRECT EXAMINATION**

BY MR. WARFIELD:

Q. Can you tell the Court your occupation and profession please?

A. Yes, I'm a Clinical Psychologist and I'm currently working in Columbia, private practice.

Q. In private practice?

A. Yes.

Q. And can you tell the Court your educational background please?

A. Yes. I hold a Psychologist's degree from Catholic University in Chile and that program is a six year professional program and I'm licensed to practice Clinical Psychology in Chile. I graduated in September of '75. I hold a Master of Education Degree from the Pennsylvania State University majoring in Rehabilitation Counseling, graduated in May of 1979. A Doctor of Philosophy from Penn State University, major in Counseling Psychology, graduated in May of 1981. I'm licensed to practice Psychology in the state of Maryland.

Q. When did you receive that license?

A. It was in March of 1983.

Q. And your profession as stated previously is as a practicing Psychologist, is that correct?

A. That's correct.

[2-9] Q. What percentage or what amount of time do you devote to dealing with children in your profession?

A. My practice—my practice currently consists of approximately twenty hours a week of direct patient contact. I have cut down my hours a little bit considering I'm expecting my third child and thirty-five percent of that practice is direct evalua—direct contact with children that have been sexually abused. That does not include two hours a week of supervision that I give to the staff of the Howard County Sexual Assault Center supervising cases of children that have been abused. In my past experience I have worked at the Johns Hopkins University School of

Medicine. I've been a member of their faculty in the Department of Child Psychiatry and while I was there my practice consisted of about thirty percent, a third, involved the evaluation and treatment of sexually abused children, but also in direct training under the direction of Dr. James Connaughton, and Dr. Rosenberg on how to treat and evaluate children with sexual abuse history.

Q. Dr. Sweeney, in the course of your practice and in dealing with the children, are you in a position to be able to judge their emotional state as it relates to their ability to communicate with you and others.

A. Yes.

Q. Other than the—than the information which you've [2-10] already given as to your educational background, do you have any other credentials concerning courses or any other academic studies that you've undertaken in this field?

A. As I mentioned before, I have had specialized training while at Hopkins. I've also taken special workshops dealing with evaluation and treatment of children that have been sexually abused. I have given workshops relating to the area and I have also been qualified before as an expert in court cases dealing with these particular kind of problems.

Q. Specifically let me ask you, have you testified previously concerning the ability of a child to testify in court or to be—or to, in fact, be permitted to have testimony via closed circuit television. Have you testified on that issue?

A. Yes I have.

Q. Have you been qualified as an expert to give your opinion on that issue?

A. Yes I have.

MR. WARFIELD: Your Honor, I would submit this witness as an expert and submit to cross-examination on qualifications at this time.

THE COURT: Mr. Kolodner.

CROSS-EXAMINATION

BY MR. KOLODNER:

[2-11] Q. Do you have any medical training?

A. I don't have medical training. I have a Doctor of Philosophy and I have been a member of the Medical Faculty at Hopkins, but I do not have medical training.

Q. How long were you at Hopkins?

A. From 1981 until 1983, full-time and then I stopped—I was expecting my first child, went back half-time with a faculty appointment and stopped agian [sic] in '84 expecting my second child.

Q. What did you do at Hopkins?

A. I was the Senior Psychologist at the Children's Mental Health Center under the direction of Dr. Connaughton. I was in charge of the Clinical Psychology Practical Placement supervising in Psychodiagnostic and Therapy of the students in Clinical Psychology of the Phd. program at University of Maryland. I also provided clinical services in psychotherapy and evaluation to eligible children. As I said thirty percent of my time was in dealing with sexually abused children there. That's basically what my duties were while at Hopkins. I also did some——

Q. You also did what?

A. I also did some research while I was there.

MR. KOLODNER: I have no further questions.

THE COURT: All right. I will permit the witness to testify as an expert and to render an opinion concerning

[2-12] whether the testimony of a child who is—might be a witness in this, whether or not, in fact, that child's testimony in a courtroom would result in the child suffering serious emotional distress, such that the child could not reasonably communicate.

MR. WARFIELD: Thank you Your Honor.

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Dr. Sweeney, I would ask you if in the course of your profession and occupation have you had occasion to come in contact with a young man by the name of Drew Woodbury?

A. Yes.

Q. And can you tell the Court the extent of your contact with him, specifically the amount of time that you have spent with him. You don't have to break that down on a day by day basis, but generally?

A. All right. I have seen Drew for about nineteen sessions, approximately for about nineteen sessions, and I saw him in connection—for an evaluation to see whether this child had been sexually abused while attending Criag's [sic] Country Pre-School.

Q. All right, and the approximate duration of each of these sessions is how much?

A. About an hour. Sometimes—sixty minutes. [2-13] Sometimes—occasionally it goes a little longer, but as an average sixty minutes.

Q. All right and—I would ask you not to reveal any specific statements that were made during the course of these sessions, but can you tell the Court the general subject matter under discussion or that was—what was the general subject matter of the meetings with the child?

A. The general subject matter discussed is I asked him to tell me about his experience while attending Craig's Country Pre-School and other areas that were—that have been important for the child right now. It's not exclusively that, but other things too.

Q. So the subject matter was alleged abuse at the School?

A. That's right.

Q. And who was the alleged abuser in that particular case?

A. In this particular case——

MR. KOLODNER: I object.

MR. WARFIELD: Well, again, I—it's only for foundation purposes.

THE COURT: Well, again, it's only relevant and it only, as I see it, goes to the issue of whether or not testimony of the chld [sic] should be taken by means of the closed circuit television and whether or not it's necessary for [2-14] the Court to do so. That's the sole purpose for this Court receiving this evidence, so I'll overrule the objection.

Q. Who's the alleged abuser in that case?

A. The alleged abuser in this particular case is Mrs. Craig.

Q. All right. Now Dr. Sweeney, based upon your training and experience and based upon your—the time that you have spent with this child, have you been able to form an opinion as to the ability of this child to come into the courtroom with Mrs. Craig present in the courtroom and to testify or, in the alternative, to be permitted to testify by way of closed circuit television. First of all, do you have an opinion on that subject?

A. Yes I do.

Q. All right. Again now, based upon your experience and training, your expertise, and based upon your contact with this child, can you tell the Court what that opinion is?

A. I personally believe—my professional opinion in my observations in the sessions with Drew that he would—he has experienced extreme level of high anxiety and distress by talking about this very traumatic event and that his ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig.

[2-15] Q. Can you characterize his level—his emotional state would he be required to come into the courtroom?

A. One of the many ways a Psychologist has to evaluate emotional state of children is observe different indexes indicating anxiety. One of them is behavior and in this particular case Drew has shown extreme regressive behavior, thumb sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kind of behaviors whenever he talks about the traumatic event that he has difficulty communicating to me in a session after he already has a rapport with me that I particularly feel he would be very—his ability to communicate would be very impaired if he were to talk about these private events in front of strangers and particularly in front of Mrs. Craig.

Q. And as to his emotional state at that particular time? You've testified he would have difficulty in communicating. How would that relate to emotional distress in the courtroom. In other words, what would his emotional state be if he were required to come into the courtroom that's what I'm asking?

A. Oh, I think he would—he would be highly, highly distressed and it would show in different ways.

Q. That's really the question that I'm asking.

A. Yes.

MR. WARFIELD: Your Honor, I—that would be all [2-16] the questions I have. Counsel.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Would he be highly distressed if he had to testify under any conditions?

A. How do you mean by that Mr. Kolodner?

Q. Well, wouldn't he be upset if the Judge asked him questions and if he were just alone with the Judge?

A. I think that it causes him anxiety to talk about these issues no matter who asks the questions, but I think the point is to minimize the anxiety and I think what causes him—would cause him the most anxiety would be to testify in front of Mrs. Craig, the alleged perpetrator.

Q. What reaction do you think that he would have if he were required to testify in this courtroom in the presence of Mrs. Craig?

A. Well, I can't predict one hundred percent what kind of behavior he would have, or reactions he would have, but I can tell you my opinion based on what I have seen while he's been in sessions with me. One of the things that I do is compare his reaction and his behavior when he talks about general non-threatening topics such as school now, things that are going on at home and he is fine. But when he's talking about the traumatic events that happened while attending Country Pre-School, he has a great deal of [2-17] difficulty communicating that to me—or has had a lot of difficulties. Has been very anxious, as I said, thumb sucking, crying, whining and my feeling is that

probably that would even be more upsetting if he had to say it here in an open courtroom. It would be even more enhanced, those kind of behaviors and he wouldn't be able to communicate as——

Q. I couldn't hear what you said?

A. He wouldn't be able to communicate effectively.

Q. And he has these reactions that you describe when you mention Mrs. Craig's, is that correct?

A. When he talks spontaneously about specific events that have happened there, he has these reactions.

Q. Well, would he have these same reactions if he were in a room just with the Judge?

A. I think that he would experience anxiety, but the degree would be less.

Q. His what?

A. I think he would experience anxiety talking about these issues, but the degree of the anxiety would be less and therefore his chances of communicating clearly what happened to him are maximized by diminishing the anxiety or the degree of the anxiety.

Q. Do you believe that if Drew Woodbury would see Mrs. Craig on the street, he would have that same type of [2-18] reaction?

A. That's a difficult question to answer because I know the variables involved in testifying in an open courtroom, but I don't know what you mean when you say see her on the street. I need to know what other variables would be there. Who would the child be with, what would be going on. It would depend on many things.

Q. Well, let's suppose that you were to say to Drew that you were going to take Drew to Mrs. Craig's house or School, would he react adversely?

A. With what purpose—for what purpose?

Q. Just to see her?

A. I think that he would be very anxious. He would ask what for.

Q. Well, besides asking what for, would he have depression, would he cry, would he give some type of adverse reaction?

A. My feeling is that again, I, you know, what would be the purpose. It depends. What would I say to the child. You say, if I were to take Drew to Mrs. Craig's house. What for.

Q. Well, why do you say that his feelings would be different in a setting away from Mrs. Craig as compared to a setting with Mrs. Craig if he doesn't know why he's going to the room to testify?

[2-19] A. Okay, I'm sorry——

Q. All right. If he's taken to a room where Mrs. Craig is not present and he's told that he's going to testify about Mrs. Craig——

A. Right, right, right.

Q. —why would his reaction be any different than if he's told that he's going to be in a room with Mrs. Craig?

A. One of the things that is very difficult for children, especially at this young age, is to tell about very embarrassing, private and traumatic events that happen especially in front of the alleged perpetrator. So, again, that is what is involved in an open courtroom. He would have to say those things in her presence and that's what would enhance his anxiety to a maximum. If he were to meet Mrs. Craig on the street, these are very casual kind of things and the variables are unknown. Where would the child be with, if the child's in anxiety, he can always go away or ask his mother or father to remove him from the situation. But if he's in an open court facing her, telling

the Court what happened, if he has that anxiety he has no resource other than an inability to communicate clearly of what happened and that's what I'm mostly concerned.

Q. Have you ever had an opportunity to compare a child's reaction that has testified in closed circuit as [2-20] compared to confrontation with the person accused?

A. I have not.

Q. You have not. So that you do not know what the reaction would be in one instance as compared to the other, is that correct?

A. No. That's correct.

Q. So your opinion what you believe could possibly happen as——

A. As based on what I've seen Drew done with me in the sessions.

Q. Have there any—to your knowledge, have there been any tests made to compare the reaction of a child in the actual setting with the perpetrator in presence as compared to the perpetrator not in presence?

A. Well, I can tell you what the——

Q. Do you know of any such study or any comparison?

A. No, I don't know of a study. I have seen reports written saying that the degree of anxiety is very high. In fact, I have it in my brief case——

Q. But no such tests have ever been made:

A. But not a test, no.

Q. So that this is only a supposition based upon what they think would happen, is that correct?

A. Based upon—based upon professional experience and basically the training and experience that I have had, [2-21] yes, and that other Psychologists have had.

Q. But to your knowledge and from your studies, no study has ever been made actually comparing the actual reaction of any child in both settings, is that correct Doctor?

A. I don't know of one.

Q. You do not know of one?

A. Right.

MR. KOLODNER: All right. I have no further questions.

MR. WARFIELD: No further questions of this witness Your Honor.

THE COURT: Thank you. You may be excused.

[2-40] • • •

MR. KOLODNER: My understanding is that the Clerk is going to bring to the Court my motion in opposition to the State's motion and my memorandum. I oppose the closed circuit. The closed circuit came about as a result of Section 9-102 of the Court's and Judicial Proceedings Article of the Maryland Annotated Code. I'm aware, as I indicated to your Honor yesterday, that the Court—this very Court has allowed closed circuit in other cases, or at least in another case. My contention is that this is not constitutional. The Statute has not been ruled upon as to whether or not it is constitutional. I believe that it is lacking in two issues. One, as to the First Amendment of the Constitution dealing with the right of the press, and the Sixth Amendment, where the defendant has the right to be confronted by his accuser. I think that this act takes away from the defendant the right of the defendant to [2-41] face the individual, in this case unfortunately small children, who accuse the defendant of the crime. It takes away the truth seeking device, the face to face confrontation that the Constitution guarantees. This Court has within its province the right to rule whether or

not this Statute is constitutional. There are other cases as I understand it on their way to the Court of Appeals to determine whether or not this is constitutional. If, in fact, what we're doing here today is unconstitutional, everything that we do from this point on is for naught. I submit to Your Honor that the video denies the defendant the constitutional right afforded under the Sixth Amendment, that this Court has the right to rule whether or not this is constitutional. I submit that it is unconsitutional [sic] and the use of the closed circuit, the video circuit should be denied.

THE COURT: Do you wish to respond Mr. Warfield?

MR. WARFIELD: Yes Your Honor. May it please the Court. I have provided counsel with a copy of an extensive article on this issue that was in the University of Baltimore Law Forum in the Spring of 1986. I have a copy that I would like to submit to the Court and ask the Court to read it at the Court's convenience. Essentially, Your Honor, I would like to adopt the position without extensive argument here, I would like to adopt the position [2-42] of the writer of the particular aritcle [sic] as it relates to this issue and as I've stated the issue itself is specifically addressed. Obviously and very clearly we're dealing with a new Statute here which has not been ruled upon by our Court's [sic] and I believe counsel is correct in stating, although I don't know the exact status of the cases, but there are cases from Anne Arundel County which are on appeal currently and in which this issue is being raised, so we will have a response at sometime and I don't know when and I can't give the Court any indication of that at this point, but we will have a specific ruling by the Court of Special Appeals or perhaps even the Court of Appeals concerning the constitutionality of the Statute under question.

The essence of the confrontation right as ruled in other jurisdictions, and there's a lot of analysis in this

article concerning how other jurisdictions have dealt with this issue, which has been raised by Court's [sic] of other jurisdiction, dealt specifically with by those courts and constitutionality has been found in other jurisdictions and the analysis basically goes to the point of whether—of the aspect of confrontation really involves the ability to cross-examine the witness and that is the essence of the confrontation right and the analysis in this article points out that that is very carefully and scrupulously maintained under our Statute and that it is because of that and because [2-43] the ability of the defendant is never impaired to any degree whatsoever under our Statute, that the confrontation right while technically perhaps being denied as a practical matter is not being denied, that the defendant has a full and absolute right to confront the witness via cross-examination and that that is maintained, and that that being the essence of the confrontation right, can, in fact yield to some degree to other considerations in terms of permitting the testimony of children and that there are other—there's a balancing test which can come in there and that, again, has been ruled on in other jurisdictions. So Your Honor, I would urge Your Honor to read the article. As I stated I have provided a copy to counsel. I do not deny this Court's right and ability to rule on the unconstitutionality. I would urge the Court to, on the basis of the authority which I have cited in the adoption of that particular argument to in fact rule the Statute constitutional and to permit us to go forward. Obviously, should the Court of Appeals or Court of Special Appeals rule to the contrary sometime during the course of our proceedings, we will be required to abide by that decision and, of course, that will affect us all at that particular point. But I would urge the Court to rule that the Statute is constitutional. I think that the confrontation right is essentially intact in this instance and that the Statute in fact does not impair [2-44] the underlying rationale of the confrontation clause and that is of a right to full and

complete ability to cross-examine and question the witnesses against an individual. So on the basis of those arguments and the arguments that I've just put forward, I would ask the Court to find that the Statute is in fact constitutional and permit us to go forward and depending on the Court's ruling, ultimately, as to the use in each individual case. Thank you Your Honor.

THE COURT: Would you have anything further you would care to add Mr. Kolodner?

MR. KOLODNER: No, that's all.

THE COURT: Well gentlemen, let me review the Law Review Article. I'd like to see the authorities referred to by Mr. Kolodner in his motion that he filed with the Clerk concerning this very issue, I take it.

MR. KOLODNER: Yes sir, on this issue.

THE COURT: Hopefully maybe sometime today I can rule on the issue.

MR. WARFIELD: As I said Your Honor, we have one further witness on the practical aspect of this matter at one o'clock and that will conclude our entire presentation as it concerns this matter.

[2-59] • • •

THE COURT: I think it's understood that this Court is asked to rule upon the appropriateness of certain named children testifying by way of closed circuit t.v.

MR. KOLODNER: That's correct.

MR. WARFIELD: Fine and I——

THE COURT: If the need arises for the Court to rule on whether its [sic] appropriate for other children to do so, that's subject to another evidentiary hearing.

MR. WARFIELD: Very good and that's—as long as that's understood at this point that we're not precluded

from doing that at a future time, that would satisfy the State.

[2-60] MR. KOLODNER: And to follow that up, I think you're referring to the Flynn case, is that correct?

MR. WARFIELD: The Flynn case is one and as I stated there may be witnesses, other children, who we would propose as witnesses in this case or other cases who would be the subject of the closed circuit television as well and at the appropriate time, if that in fact arises, as I said if we could have an opportunity to be heard on that we would appreciate it.

MR. KOLODNER: I just did pick up the papers in the Flynn case, the arraignment is set for February the 10th and I see no problem at anytime if the State wishes to put testimony in on that particular case, that we could do it at anytime that we're here for any motion or for any reason that we're here. I don't think I would need any particular advance notice for that, that we could just do it today if you had someone here to——

MR. WARFIELD: I don't have the witness here. The witness was here yesterday, but——

MR. KOLODNER: Yeah, but the point I'm making is that I don't think that advance notice has to really be given.

MR. WARFIELD: With that in mind and in view of the fact that we have argued on the constitutionality, I would now, Your Honor, from the practical aspect move that in each and every case that we've presented, in other words [2-61] each and every named individual, that we have laid the foundation and satisfied the predicate set forth in the statute which would enable the Court to find that in each and every case that closed circuit television testimony by each of these children is appropriate and is in fact required, really, under the statute and I would ask the Court to find in each and every case that there is a

basis for the decision to allow it pursuant to the statute, that there has been a need shown, there has been testimony in each case that would establish that the child in each and every case would be under such emotional distress that they would be unable to communicate rasonably [sic] in the courtroom and therefore that it would be entirely appropriate and requisite for this procedure to be applied in this case. I might also point out to the Court that Lieutenant Pruitt from the Sheriff's Department who is in the courtroom right now, and this is more on a practical level, is familiar with the operation of the procedures involved, has in fact done the procedures involved, has the equipment and would as a practical matter take care of setting the equipment up and handle the matter from that aspect, so there is a support aspect to it above and beyond the decision to conduct it, that we have the ability to do it with a minimum intrusion on the court and that it can be set up and has been set up in the past for other cases. So [2-62] should the Court rule in our favor in this regard, we have the capacity to set that up and of course Lieutenant Pruitt is available to the Court for any questions as far as the practical application is concerned. With that in mind I would then ask the Court to find in our favor.

THE COURT: Mr. Kolodner, would you like to comment.

MR. KOLODNER: I merely repeat what I had said before and there's no point in repetition, if it please, but we ask that it not be used, that we run the risk of having the Court of Appeals rule that all this proceeding is for naught and it can be decided at this time that this statute is unconstitutional.

THE COURT: Counsel I read—I had read a couple of days ago the Law Review article only because it was one of the few things I could find on the statute, but I reread it during the lunch hour. When I say the Law Review article I'm talking with reference to an article in

the University of Baltimore, School of Law, Law Forum from the Spring of '86 concerning the use of close circuit television and to some extent it addresses the constitutional issues that are raised by the defendant in this case. I would agree that if this—the Court believed upon its evaluation and study of the statute that it was unconstitutional, it would be totally inappro- [2-63] priate for me to say, well I'm just not going to rule on that issue because its [sic] before the Court of Appeals or the Court of Special Appeals. It seems to me that it is appropriate for this Court to rule on that issue. I don't find the statute to be unconstitutional. When I say the statute I'm referring to Section 9-102 of the Court's and Judicial Proceedings Article providing for closed circuit television. The argument of the defendant in the case went to two issues, as I recall them. One that it violated the First Amendment. I assume counsel was referring to the First Amendment protection provided or afforded the right of the public and the press to have access to trials. I think that very issue is addressed in the Law Review article and I think the observations of the writer are valid. Let me see if I can put my finger on it. The writer of the article said;

> "That under the Maryland Statute the access—the only access to the room where the child is testifying is limited. The courtroom is still open to the press and the public and obviously the press and the public can see and can hear what the witness says and what the alleged victim testifies [2-64] to."

So I don't find that it's violative of any First Amendment rights, and I guess the thrust of the objection of the defendant is that it goes to the violations of right of confrontation guaranteed by constitutional protections. The statute does, I agree, take away the right of the defendant to be face to face with his or her accuser, but again as I understand the procedure outlined by the legislature, the defendant's counsel is present. The defendant's counsel has

the right to observe and see the witness. There's the right of cross-examination afforded the defendant and I think the State's right when he says the essence of the right of confrontation is the right to question or cross-examine and that's provided by the statute. The witness as I see it is in the presence of counsel for the defendant. The question's spontaneous. The trier of fact, the jury, can see the witness, can hear the responses, can judge the demeanor of the witness. I don't find there's any violation of—of the right of confrontation. I don't believe that the statute as it exists violates the defendant's right of confrontation under the Sixth Amendment. So I find that the statute is constitutional and then the issue as I see it then is whether the State in this present case, whether it's appropriate to provde that the testimony of certain of [2-65] these individuals proceed by way of closed circuit television and the issue, I guess, the concrete issue is whether the State should be permitted to present the testimony of the certain named children who have been referred to in the evidence who are alleged victims in the cases against Sandra Craig and Jamal Craig by way of closed circuit television consistent with the procedures set forth in Section 9-102. There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and its [sic] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102 assuming that the child's deemed to be competent to testify and the child's testimony is relevant and of course not otherwise objectionable and assuming those two predicates are met, that is that the child is determined to be competent and that the subject matter of the child's testimony is relevant and not otherwise objectionable, each of the children referred to

in the evidence will be permitted to testify by means of closed circuit television consistent with the procedure set forth in Section 9-102.

[2-66] MR. WARFIELD: A point of clarification, Your Honor, if the Court pleases. There is—the question is—the Court has raised that leads us to this point and that is on the issue of competency as it applies to each witness. Again in conjunction with the Court's order, we would ask that those circumstances also be subject to the same ruling by the Court and that the competency——

THE COURT: To the extent that in order to determine the competency of a witness it's necessary to question the witness, the Court would envision that that interrogation of the child witness would be done by means of closed circuit television.

MR. WARFIELD: I believe that you, Your Honor, if you're the Judge that's going to be doing the questioning will be face to face with the child and I'm saying this by virtue of past experience in the other cases that we've utilized this that your confrontation or your interrogation of the child will then be broadcast back to the defense—to the defendant at that particular time and made—obviously made a part of the record and the observations can be made at that time and I would ask the Court to and I believe the Court already has indicated that that would be the process that would be utilized, is that correct.

THE COURT: It would seem to me that any questioning of the witness—of these specific children on the very [2-67] issue of competency to the extent that the Court would have to interrogate the witness, it would seem to me that's one of the criteria, in fact the only criteria the Court should consider in determining competency, it would—the Court would do so in this fashion.

MR WARFIELD: All right Your Honor. Would the Court have any questions of Lieutenant Pruitt just as a

practical matter at this time or I'm pointing it out for this reason. Due to the way that the courtroom is set up here we can make one or two monitors available. For example if it would be deemed appropriate that the defendant would have their own monitor as opposed to the jury have a monitor, that can be done or a single monitor can be set up. It's just a matter of logistics in terms of——

THE COURT: We've had video taped depositions in this courtroom and we just put a monitor right in front of me or on the witness stand and it's been my experience that everybody can see what's going on.

MR. WARFIELD: All right, I'm just saying that we have the capacity to modify these matters. We have the equipment and the ability to be able to do that to accommodate—perhaps again, no criticism intended of the way the courtroom is set up, but in order to——

THE COURT: The record is silent as to how this [2-68] courtroom is designed. Maybe you both want to clarify that.

MR. WARFIELD: Well it—the—for the record purposes, the jury is opposite the Judge in a semi-circular fashion. Defense attorney is on one side and of course the Judge is facing and just for being able to make an observation direct, which I think is important in this case, that the—that the children be very clearly focused in the camera and that the jury and that obviously even the defense and the Judge have an opportunity to see directly what is depicted on the screen. That it be in such a fashion that everybody has a clear view and if it entails more than one we can accommodate that, I'm saying from a practical standpoint. But these are practical things that can be taken care of at anytime.

THE COURT: Well it seems to me that the only requirement is that procedurally the closed circuit t.v. proceed as required by the statute and how that's handled

has to be consistent with the abilitiy of the jurors, the defendant to see what's being said and hear what's being said. I don't think it's that difficult. I guess the location of where this closed circuit takes place is subject to discussion of counsel. One—I assume it might be one possibility would be that counsel and the child were in my chambers or somewhere—I don't know where else they'd be [2-69] in this courtroom.

MR. WARFIELD: I believe that's what we would propose.

THE COURT: I assume that's a logical place. There maybe other places and I assume that once the logistics of the closed circuit are agreed upon, they can be set forth in the record and any objection to the mechanics of how it would work can be noted for the record by counsel for the parties.

MR. WARFIELD: Very well Your Honor.

• • •

[Certificate of Court Reporter omitted in printing]

[1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Case No. 15625

STATE OF MARYLAND

VS.

SANDRA A. CRAIG

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDING
(Trial on the Merits)
VOLUME I of XII

Howard County, Maryland

March 16, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.
(and a jury)

APPEARANCES:

For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defense:
F. Kolodner, Esquire
J. Hirt, Esquire

Janet Falkenstine - Court Reporter
Circuit Court for Howard County
8360 Court Avenue-Room 435
Ellicott City, Maryland 21043

[1-36] • • •

MR. KOLODNER: At this time then I would like to make my motion or renew my motion that, although the court has already ruled on this motion, that this procedure not be used using the video, closed circuit television, that I renew my motion on the grounds that the defendant, by the use of this procedure is being denied her rights under the sixth amendment of the constitution of the United States, is not being confronted by the accuser and that the State at this time could change this procedure and avoid the possibility that this law be declared unconstitutional which the defense firmly believes is unconstitutional and that the case could be conducted in the ordinary manner in having the child testify [1-37] in the courtroom. And for these reasons I would renew my motion that . . . as to the use of the closed circuit television.

THE COURT: The State would propose to call Brooke Etze as its first witness?

MS. O'DONNELL: That's correct, your Honor.

THE COURT: Alright. I'm going to overrule the objections that counsel made to the appropriateness of this court permitting that child to testify consistent with the statute for the reasons I indicated previously. I would have to speak with this child in chambers in order to satisfy myself that the child is competent. Can the child be brought here in a few minutes—the child is in your office or something?

MS. O'DONNELL: Yes, Your Honor, she's in my office waiting for directions to be brought over here.

THE COURT: Alright. Assuming we can conclude that hurdle, that is, in a short period of time, at least make a determination as to whether or not the child's competent, is it likely we can present some testimony from the child this morning.

MS. O'DONNELL: Yes, Your Honor, if that's your wish.

THE COURT: Well, I'm just trying to think . . . lunch hour . . . I'm going to send the jury back to the jury room and possibly we can get them before lunch if the child is ruled competent. Alright, I would propose at this time to [1-38] excuse the jury and then speak with the child in chambers in the presence of counsel concerning determination of whether or not the child is competent. Obviously after I conclude questioning the child, if counsel want to be heard concerning whether or not it is appropriate for me to determine the child as competent or not, we'll come back here and hear from you on the record on that issue. Alright, let me just tell the jury.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

THE COURT: Ladies and gentlemen, there are going to come periods or occasions during the course of the trial that I'm going to be required to consider certain matters from counsel, arguments, perhaps even evidentiary matters out of your presence, that is, you'll not be present when certain proceedings take place. This is one of those stages at this time. I'm going to ask you to return to the jury room. We shouldn't be too lengthy. As soon as I conclude we'll get you back here. Would you just recess to the jury room please.

(JURORS LEAVE COURTROOM)

THE COURT: Would counsel and perhaps Mrs. Craig could approach the bench also, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: I would propose at this time to question the child in my chambers. Is . . . is . . . Mr. Kolodner, I take it, [1-39] going to be present in chambers with me?

MR. KOLODNER: That's my understanding of this procedure.

THE COURT: Sure. Mr. Hurt would remain here with Miss Craig?

MR. KOLODNER: Yes, that's right. As is . . . as I understand it only one counsel . . .

MR. WARFIELD: I'll be here in the courtroom.

MR. KOLODNER: . . . is allowed . . .

THE COURT: And Mrs. Craig and Mr. Hurt understand how they can communicate with you in my chambers?

MR. KOLODNER: My understanding . . . my understanding is that the telephone will be left open . . .

THE COURT: Yes.

MR. KOLODNER: . . . for you - Miss Craig, do you understand this?

MRS. CRAIG: Yes.

MR. KOLODNER: That if you want to ask me anything or you want to tell me anything or advise me of anything, that you merely talk on that telephone and that no one else is permitted to listen to that conversation. That is to be closed between you . . .

THE COURT: Matter of fact, it is closed.

MR. KOLODNER: . . . and that office. Sorry.

THE COURT: The phone system is closed so that once [1-40] that receiver is up, no one else on the switchboard can talk. I mean, that's the way the system works.

MR. WARFIELD: (Inaudible)

THE COURT: Any questions as to . . .

MR. KOLODNER: Do you understand that, Mrs. Craig?

MRS. CRAIG: I was afraid if I wanted to speak to you . . .

MR. KOLODNER: Alright, if you (inaudible) and that will be fine I'll understand that you want to say something.

THE COURT: Alright, I would propose then to recess. We'll recess briefly.

(RECESS)

(COMPETENCY QUALIFICATION OF BROOKE ETZE BY THE COURT IN CHAMBERS VIA VIDEO TAPE)

COMPETENCY QUALIFICATION

BY THE COURT:

Q. Do they call you Brooke? Do your friends call you Brooke?

A. Yes.

Q. How old are you Brooke?

A. Seven.

Q. Are you in school?

A. Yes.

Q. Do you know where you are today?

A. No audible response.

[1-41] Q. Where are you?

A. In the court.

Q. In the court house. How'd you get here today? Did somebody bring you here?

A. Mrs. Miles.

Q. Mrs. Miles?

A. Um huh.

Q. You're in the first grade at Clarksville. Who is your teacher?

A. Miss Higgins.

Q. Miss Higgins?

A. Um huh.

Q. And, do you have any brothers and sisters?

A. No.

Q. Okay. What . . . what do you learn in Miss Higgins' class? What subjects do you teach, what do you?

A. We learn handwriting, and we're learning numbers.

Q. You learned some numbers?

A. (No oral response)

Q. Do you learn some hand . . . can you write your name?

A. (No audible oral response)

Q. Do you know your ABC's?

A. Yes.

Q. You do. Tell me the ABC's.

A. A,B,C,D,E,F,G,H,I,J,K,L,M,N,O,P,Q,R,S,T,U,V, W,X,Z

[1-42] Q. Very good. And you say you learn handwriting. Do you do cursive writing or do you write the letters out or how do you write? Can you write your name?

A. Yes, but not in cursive.

Q. Alright, you don't write in cursive yet?

A. No.

Q. Do you know your numbers?

A. Yes.

Q. What numbers do you know?

A. 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20.

Q. You went all the way up to twenty, one to twenty. Do you know how to add . . . and add and take away?

A. Um huh.

Q. Do you know things like that?

A. Um huh.

Q. Do you know how . . . tell me how to add or tell me take numbers. How do you do that? Do you know like two plus two.

A. Four.

Q. Very good.

A. (Oral response inaudible)

Q. Okay. Do you know colors?

A. Yes.

Q. What color is this robe that I'm wearing?

A. Black.

Q. Um huh. And how about the lady behind you, what
[1-43] color dress does she have on?

A. Red.

Q. Alright. You live with your mother and father?

A. Yes.

Q. Yes?

A. Yes.

Q. What is your mother's name?

A. Chris Etze.

Q. Alright, and how about your dad?

A. Tony Etze.

Q. Where did you go to school before you started at Clarksville, Brooke?

A. Mrs. Craig's.

Q. Do you remember going to school at Mrs. Craig's school?

A. Yes.

THE SHERIFF: Excuse me, Your Honor, she's going to have to speak up some. We can hardly hear her.

THE COURT: Okay.

Q. You are going to have to speak a little louder, okay. Can we bring the mike closer to her or something like that?

THE SHERIFF: That's what I'm going to do.

BY THE COURT:

Q. You say you remember when you went to Mrs. Craig's school?

[1-44] A. Yes.

Q. Alright. And do you know that we're going to ask you some questions today about what happened at Mrs. Craig's school, do you know that?

A. Yes.

Q. Alright. And will you answer those questions for us?

A. Yes.

Q. Will you tell us what you remember?

A. Yes.

Q. Alright. Did anybody tell you what to tell me or what to say?

A. Un un .

Q. When . . . when . . . if I ask you a question or if the other people behind you later on ask you questions, will you tell us what you remember?

A. Yes.

Q. And you won't tell us what somebody told you to say, will you?

A. No.

Q. Did anyone tell you to say bad things about Mrs. Craig or anything like that?

A. No.

Q. Do you know the difference between right and wrong, Brooke?

[1-45] A. Yes.

Q. Tell me . . . tell me what the difference is, do you know? What's wrong?

A. What's wrong is to tell a lie.

Q. Okay. Do you know the difference between telling the truth and telling a lie?

A. Yes.

Q. What's the difference?

A. The truth depends on what you say, is it true or not true.

Q. Is it wrong to tell a lie?

A. Yes.

Q. Well if I told you . . . if I told you that I was a lady, would I be telling you the truth?

A. No.

Q. Why?

A. Because you're not a lady . . .

Q. Alright.

A. . . . you're a man.

Q. Okay. And if I told you that . . . that you were a school teacher, would I be telling the truth?

A. No.

Q. Why?

A. Because I'm not a school teacher.

Q. Alright. So you say it's wrong to tell a lie, is [1-46] that right?

A. Yes.

Q. Why is it wrong? Will something happen to you if you don't tell the truth?

A. Yes.

Q. What will happen?

A. Well sometimes I would get in trouble.

Q. How would you get in trouble?

A. Sent up to my bedroom.

Q. If . . . if your mom or dad . . . if you told a lie and your mom and dad found out about it, what would happen to you?

A. They would probably ground me for a year.

Q. Ground you for a year? What do you mean by grounding you?

A. They would make me lose something.

Q. Like couldn't watch TV or something like that?

A. Yes.

Q. Alright.

A. I would have to do it.

Q. Okay. Do you understand that when we ask you questions here today and when the other two people ask you questions later on, that you have to tell the truth?

A. Yes.

Q. Alright. Will you tell the truth?

[1-47] A. Yes.

Q. Alright. And do you understand that you have to tell the . . . tell us the truth, you can't lie to us, do you understand that?

A. Yes.

Q. Alright.

THE COURT: Alright, counsel, I would propose to perhaps hear from you outside if you like concerning the issue of this child testifying. Perhaps we could go outside and hear from you at bench. Brooke, I'm going to step outside into the courtroom. You can remain here for a few minutes with the man who's operating this machine, alright.

A. Okay.

THE COURT: Thank you. I'll be with you in a few minutes. And then perhaps after I'm finished I may stay out there or I may come back, so it might be that I stay out there and the other people will talk to you in here, do you understand that?

A. (No audible oral response)

THE COURT: Okay. I'll be with you in a few minutes.

(JUDGE PROCEEDS TO COURTROOM)

(MONITORS SWITCHED)

THE COURT: Have a seat please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: Would you like Mrs. Craig up here?

[1-48] MR. KOLODNER: Yes, I think so.

THE COURT: Miss Craig, would you come up please?

(MRS. CRAIG APPROACHES THE BENCH)

MR. KOLODNER: The defendant has informed me . . . said that she could only hear part of what the child was saying and could not hear the rest, is that correct?

MRS. CRAIG: Yes, her voice kind of drops down.

MR. KOLODNER: And as to the competency, I think I would like to have it explored more as to who has talked to her such as the therapist and if the therapist told her to say anything in this courtroom today.

THE COURT: Does counsel want to respond?

MS. O'DONNELL: Your Honor, I would respond on behalf of the State. I think that the Judge's voir dire of Brooke Etze regarding her competency to stand trial is complete and satisfactory and sufficient. The Court . . .

THE COURT: Ladies and gentlemen, you'll have to help us out please, please. Surprising, they can hear what you're saying, but they can't hear what's going on up here. Please, quiet.

MS. O'DONNELL: Brooke indicated in response to your question that she knew why she was here . . . where she was and that she knew on what she was here for today. She indicated that she understood the difference between telling the truth and telling a lie. She indicated

that she under- [1-49] stood the importance of telling the truth. She indicated she understood that . . . that . . . the consequences of not telling the truth or the consequences of telling a lie by giving answers to the effect . . . to the effect that she would be punished if she didn't tell the truth. After your question in that regard she . . . again, in response to a number of your questions that she would tell the truth, that she understood to tell the truth. She was asked specifically whether she was in court for the purposes of saying things that had happened to her after she became . . . that she did remember on Mrs. Craig's school and she indicated that she was. Your Honor, any other questions beyond this are not questions that go to the threshhold question of the competency of a witness to testify.

THE COURT: Well, I understand counsel's objection or concern. It seems to me that's a matter that perhaps could be raised by way of cross examination. I'm satisfied, based upon my questioning the witness that the witness is going to tell us what she recalls and not based on what someone else dictated to her to testify. And it seems to me that goes . . . that's the issue for competency. She obviously has the ability to . . . to communicate with me and with counsel. She understands questions. She can formulate and articulate answers. I'm satisfied by my . . . I should say that for the record, I am wearing a black robe and counsel has a red dress on, or [1-50] business suit. That's not Mr. Kolodner's red business suit. Miss O'Donnell has a red business suit on. (Very noisy) Some static drowned out the audio. In fact nothing was . . . said at that time. She certainly has based on my questioning of her, satisfied me that she has the ability to observe and remember things about what she's testifying and she understands her obligation to speak the truth. So I overrule the objection of the defendant. I'm satisfied that this witness is competent and will permit her to testify. Now, mechanically how we do that is . . . I assume counsel are

going to go back to the . . . first of all, sheriff, I can't see this monitor.

THE SHERIFF: I'll turn it around.

THE COURT: Thank you. I assume the defendant and Mr. Hurt can see that monitor. Perhaps even the one in front of us. Certainly the jury will be able to see the monitor in front of us.

THE SHERIFF: She doesn't . . . we can't hear her very clearly.

THE COURT: Well, then we're just going to . . . any time you can't hear, I assume counsel's going to have to bring it to my attention or I can just push a button and talk over everyone and say you can't be heard. Obviously if I can't hear, the jurors can't hear, the defendant can't hear, then we have to . . . if you can't hear, just let me know and I'll . . . I'll [1-51] instruct . . . by just pushing this button . . . let me just see if I can reach the . . . now, I'm going to be heard if I push this. Am I going to be heard on this monitor. May I inquire, if counsel want to approach the bench, then, of course, they can . . . the sheriff can just pull the plug in there and let's proceed and see how we do.

MS. O'DONNELL: Your Honor, for the record . . .

THE COURT: Yes.

MS. O'DONNELL: . . . pursuant to our discussion in chambers this morning prior to commencing this case, I asked permission to be able to . . . in the event that Mr. Kolodner and I must leave the room in order to meet with you for the purposes of a bench conference, give brief instructions to Brooke Etze, the witness, regarding the fact that she is to stay in the room, that we will be back so that she is not left without any kind of idea as to where we are going and if we're coming back.

THE COURT: Mr. Clerk, tell those folks to keep quiet or they're going to have to leave.

THE CLERK: Ladies and gentlemen, keep your voices down.

THE COURT: Ladies and gentlemen, please, this is a public trial, everyone has the right to be here, but the proceedings . . . you know, we're having enough trouble with the video equipment, the court reporter's having enough time [1-52] talking to me, I don't think we're going to have any trouble with the equipment, but we haven't even gotten to that stage 'cause the court reporter can just hear you talking above me, but they can't hear what's being said up here. It's . . . believe it or not, it's more important to hear what the attorneys say than what you have to say. So, please, if you want to talk, whisper. If need be, just step outside. Pardon me.

MS. O'DONNELL: That's the State's only comment, Your Honor.

THE COURT: It's understood that if counsel wish to approach the bench that Miss O'Donnell may state that the . . . to the young girl that, you know, that she has to stay there. She may wander off in my chambers or something.

MR. KOLODNER: No objection to that.

THE COURT: Sure. Let's proceed. May I inquire of counsel, do you believe it appropriate for the child to be given an oath?

MS. O'DONNELL: Your Honor, I don't think it would be inappropriate to give her an oath as every other witness in the case.

THE COURT: I'm going to instruct the clerk, once you're assembled, to walk into the room and to just ask the child if she will agree to testify truthfully and to speak the truth in the course of . . . just modify . . . yes sir.

[1-53] MR. WARFIELD: Just . . . can we make sure Lieutenant Pruitt gets this tape (inaudible)

THE COURT: Ask Lieutenant Pruitt to come in.

MR. WARFIELD: . . . it was recorded (inaudible)

MR. KOLODNER: When we go back maybe we can tell him to come out so the child is not left alone.

THE COURT: You go in and tell him to come out. You may return to your seat, yes ma'm.

(PAUSE IN PROCEEDINGS)

THE COURT: Apparently there's some concern that the audio portion of the tape is not . . .

SHERIFF: Video, Your Honor. The video . . . the camera will cut off after about five minutes without recording. That's what's happening.

THE COURT: Have the jury brought in somebody. Sheriff, ask the jurors to be brought in.

(JURORS ENTER COURTROOM)

THE COURT: Counsel, I'm going to instruct the clerk to swear the witness in. Are there any preliminary matters before I do so?

THE SHERIFF: I don't believe counsel can communicate. Just haven't found him.

THE COURT: Well, maybe he hasn't picked up the phone so . . . Sheriff, if you're ready to proceed you can do so. I will instruct the clerk to swear in the witness.

[1-54] MR. KOLODNER: If it please the court, co-counsel . . .

THE COURT: Just a minute. Want to approach the bench, please? Counsel approach the bench, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

MR. KOLODNER: Counsel says he's been trying to reach me on the phone and . . . many times and has not been able to reach me. I've been in there saying, I'm here, does anyone want to say anything to me, but I haven't been able to get any response.

THE COURT: Have you pushed the button down?

MR. KOLODNER: I didn't know . . . I didn't push any button.

THE COURT: Sorry about that, but you're supposed to push the button.

MS. O'DONNELL: I'm not aware. Your Honor, I would suggest that perhaps we excuse the jury and work out the wrinkles and . . .

MR. KOLODNER: That's ironic. I didn't know there was a button. Maybe I did something wrong because the button . . .

MS. O'DONNELL: (Inaudible)

THE COURT: Let's find out from the Lieutenant how long we're going to be. He told me it would just be a minute or two.

MS. O'DONNELL: Your Honor, I have a suggestion if you excuse the jury. If satisfied with defense counsel's . . . [1-55] is comfortable with the . . .

MR. KOLODNER: It's just that I think the child is getting a little restless from my observation. I see her keep moving . . . kicking her legs, it's just an observation.

THE COURT: Is anybody with the child?

MR. KOLODNER: Yes sir.

MS. O'DONNELL: I would just ask (inaudible)

THE COURT: Sheriff, would you just come here a minute, please? I'm not trying to take you to task or

anything. Is it going to take a little while - are you having a problem with that?

THE SHERIFF: Yes sir.

THE COURT: Okay, probably on this note we might break for lunch, okay? Do you want to do that. And apparently counsel's having problems communicating with his colleague at the trial table on the . . . my telephone.

THE SHERIFF: Do you have any problems with me putting another telephone in there?

THE COURT: I . . . you can put anything in there.

MR. KOLODNER: Well, was I supposed to push anything?

THE COURT: Was he to push the button down or something?

THE SHERIFF: No, you should just talk.

[1-56] MR. KOLODNER: I was saying . . .

THE SHERIFF: Did you hang it up?

MR. KOLODNER: Have it hung up, no. Well, you were in there when I kept saying, I'm on here, is anyone talking.

THE COURT: Let me have the jurors back at one thirty, okay.

THE SHERIFF: Sorry, about this, Your Honor. Yesterday it worked fine, no problems at all.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

THE COURT: Ladies and gentlemen, we're having some problems apparently tying into the phone line and my office so, probably it's going to take us just a few minutes to resolve those. It might be appropriate just to send you all to lunch. Come back here at one thirty and

we'll reconvene at that time. Again, during this recess and any other recess, you're not to discuss the case with yourselves, you're not to discuss it with the press, with litigants, with concerned citizens, with anyone. If there is any violation of that come see me. We'll recess until one thirty.

(LUNCHEON RECESS)

(AUDIO TEST FROM JUDGE'S CHAMBERS)

(AFTER RECESS)

THE COURT: Have a seat please. As [sic] the jurors in, [1-57] please. Hold the jurors, Sheriff. Want to approach the bench.

THE SHERIFF: We still seem to be having difficulty with this phone system.

THE COURT: Can we proceed sheriff. Ask the jurors in.

(JURORS ENTER COURTROOM)

MR. WARFIELD: Could the record just reflect verbally what the set up is here?

THE COURT: Approach the bench, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: Again, we . . per where we were at the time we recessed, Mr. Hurt is in the courtroom with the defendant, Mr. Warfield is in the courtroom. In my chambers which I just left are Mr. Kolodner for the defendant and Miss O'Donnell for the State, a technican [sic] operating the equipment and a witness who has just taken the witness stand.

MR. WARFIELD: I think it should further be pointed out that there is two-way communication between . . .

THE COURT: There still is communication between counsel, Mr. Hurt and Mr. Kolodner in my office.

MR. WARFIELD: And that the defendant is capable of seeing the monitor and observing all the . . .

THE COURT: There are two monitors set up in the courtroom, one is in the presence . . . the jurors can . . .

[1-58] MS. O'DONNELL: For the record, this is Kate O'Donnell speaking. It is approximately ten minutes until two o'clock on the afternoon of Monday, March the 16th of 1986 . . .

MR. WARFIELD: '87.

MS. O'DONNELL: . . . excuse me, '87. Present in the courtroom is Brooke Etze, a witness in the case of State of Maryland versus Sandra Craig. Also in the room is Fred Kolodner, counsel for the defendant, Kate O'Donnell, Assistant State's Attorney, Lieutenant Pruitt, acting as counter-technician, and Mr. Merson, clerk of the court.

BROOKE ETZE

a witness, called on behalf of the State, having previously been sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Brooke you're going to have to talk loud enough for all of the people in this room to hear you, okay.

A. Okay.

Q. And loud enough so that your voice is properly recorded on the recording machine that we're using to record everything that you say in this room, okay?

A. Okay.

Q. You've just been given an oath from Mr. Merson, an oath is a promise to tell the truth. I'm going to ask you [1-59] some questions and then Mr. Kolodner's going to ask you some questions. Do you understand that?

A. Yes.

Q. Do you understand, first of all, Brooke, how important it is to tell the truth?

A. Yes.

Q. What is the difference between telling the truth and telling a lie?

A. It depends on what you say.

Q. What do you mean? What does it mean to tell the truth?

A. It means . . . if you're telling somebody something that . . . if you're telling somebody something and . . . if you're telling somebody something and they just . . .

Q. If I told you that you were wearing a red dress, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said you had blonde curly hair, would I be telling the truth or would I be telling a lie?

A. That's a toughy.

Q. Do you have blonde hair, yellow hair?

A. No.

Q. What color is your hair?

A. Black.

Q. If I told you it was snowing outside today, would I [1-60] telling the truth or would I be telling a lie?

A. A lie.

Q. Is it important to tell the truth?

A. Yes.

Q. What happens to you if you tell a lie and don't tell the truth?

A. Sometimes I get grounded.

Q. What do you mean by getting grounded?

A. I mean . . . it means that you lose something.

Q. Is it like a punishment?

A. Yes.

Q. How do you feel inside if you tell a lie?

A. I feel unhappy.

Q. Do you know how important it is to tell the truth when you come to court?

A. Yes.

Q. How important is that?

A. Well, it's very important.

Q. Did you promise to tell the truth and nothing but the truth?

A. Yes.

Q. Brooke, what is your whole name?

A. Brooke Etze.

Q. What is your middle name?

A. Su Jin.

[1-61] Q. What kind of name is Su Jin?

A. Well, it's sort of a name . . . it means Brooke, my real name.

Q. It means Brooke?

A. Yes.

Q. How old are you Brooke?

A. Six.

Q. And when is your birthday? What day is your birthday?

A. April 11.

Q. And where do you go to school now?

A. I go to Clarksville Elementary.

Q. And what grade are you in?

A. First.

Q. And what is your teacher's name?

A. Miss Higgins.

Q. Is she a nice teacher or a bad teacher?

A. Nice, except when she gets grouchy.

Q. What is your mom and dad's names? What is your mom's name?

A. Chris Etze.

Q. And what is your dad's name?

A. Tony Etze.

Q. And where do you live?

A. Fulton, Maryland, Rainbow Street.

[1-62] Q. And what does your mom do for a living?

A. She teaches.

Q. Where does she teach?

A. That's a toughy.

Q. Do you know or don't you know?

A. I don't know.

Q. What does your dad do for a living?

A. He works for the government.

Q. Where did you go to kindergarten last year?

A. Clarksville Elementary.

Q. And where did you go to sc' ool before you went to kindergarten?

A. Mrs. Craig's.

Q. And where did you go to school while you were in kindergarten besides Clarksville Elementary School?

A. Mrs. Craig's.

Q. So you went to Mrs. Craig's school for two years, yes or no?

A. For a little bit. I'm not sure for that.

Q. Tell me what Mrs. Craig looks like.

A. Well, she has . . . well, she's black.

Q. What color hair does she have?

A. Black hair, curly black hair.

Q. Brooke, what kind of makeup does she wear?

A. She wears eye stuff and she wears cheek stuff and [1-63] she wears outliner for her lips and she wears lipstick.

Q. And what kind of clothes does she wear when she was at her school?

A. A black jacket.

Q. Does she wear dress-up clothes or play clothes?

A. She wears . . . sometimes dress-up clothes but not always.

Q. Did you know whether Mrs. Craig was married or not? Whether she had a husband or not?

A. No.

Q. Do you know or don't you know?

A. I don't know.

Q. What was Mrs. Craig's job at the school?

A. Well, the only thing I can think of is to scare kids.

Q. Was Mrs. Craig nice or bad?

A. Bad.

Q. Was she ever nice?

A. To the parents she was.

Q. Tell Mr. Kolodner and I about the bad things that Mrs. Craig did.

A. Well, she would kick me in my leg.

Q. Would she kick you anywhere else or not?

A. Yes.

Q. Where else would she kick you?

A. In my privates.

[1-64] Q. What do you mean by your privates? Is that a part of your body?

A. Yes.

Q. Would you show me and show Mr. Kolodner by pointing what you mean by your private?

A. Well, up here and down there.

Q. Down between your legs?

A. (No oral response)

Q. Where would Mrs. Craig be and where would you be when she would kick you in your privates?

A. Sometimes upstairs or sometimes in the woods.

Q. Where upstairs?

A. In her office.

Q. Did Mrs. Craig do anything else that was a bad thing?

A. (No audible oral response)

Q. Did she ever touch your private parts with anything else?

A. (no oral respone [sic])

Q. Well, tell me about it.

A. With a stick.

Q. Where did she touch you with a stick?

A. In my private parts.

Q. Would you mind touching to your private parts again so we can see what you're talking about?

A. Here between my legs.

[1-65] Q. How many times did Mrs. Craig touch you with a stick in your private parts?

A. A lot of times.

Q. What did that feel like?

A. It feeled . . . it doesn't feel good.

Q. How did it make you feel?

A. It made me feel strange.

Q. Where in the school would you be and where in the school would Mrs. Craig be when she would touch you with a stick in your private parts?

A. Well, we would be sometimes in the woods and sometimes in her office.

Q. Where would the other kids be when you would be in the woods with Mrs. Craig?

A. Outside.

Q. Where outside?

A. On the playground.

Q. Where would the other kids be when Mrs. Craig was up in her office with you?

A. At nap time.

Q. Where were they taking their naps?

A. She had all sorts of places. Sometimes where the older kids stayed where the big kids class was and in the place where we always played when it was raining.

Q. What other parts of your body did Mrs. Craig touch [1-66] in a bad way?

A. (Unable to understand)

Q. Did she ever touch your head?

A. (No oral response)

Q. What did she do to your head?

A. She hurt it.

Q. How did she hurt it?

A. She kicked me.

Q. Where did that happen, Brooke?

A. Outside and sometimes inside at nap time.

Q. What were the things that Mrs. Craig did that she called spider bites.

MR. KOLODNER: Objection.

THE COURT: Okay, let counsel approach the bench please.

MS. O'DONNELL: Brooke, we're leaving the room for a minute. We'll be right back, okay.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: The question as I understand it was, what did she do that was spider like . . .

MS. O'DONNELL: What did she do that she called spider bites.

THE COURT: Spider bites. What is the objection, Mr. Kolodner?

MR. KOLODNER: Because of the leading question. The [1-67] child has never said anything about spider bites.

THE COURT: Alright, I'll overrule the objection. Don't lead the witness Miss O'Donnell, but I'll permit the question.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

BY MS. O'DONNELL:

MS. O'DONNELL: Let the record reflect that counsel for the State and the defense are back in the Judge's chambers with Brooke Etze.

Q. Brooks, you can answer that question that I asked you. What did Mrs. Craig do that she called spider bites?

A. Thumb tacks.

Q. Say that, I didn't hear you.

A. Thumb tacks.

Q. What about thumb tacks?

A. She would say they were spider bites.

Q. And what would she do with those thumb tacks?

A. Well, she would make them look like spider bites.

Q. Tell me in more detail what she did with the thumb tacks.

A. Well, she would make them that were called spider bites.

Q. Where would she make them?

A. In her hand.

[1-68] Q. How would that feel?

A. Uncomfortable.

Q. Keep your voice up Brooke so we can all hear you.

A. Okay.

Q. What kind of rules did Mrs. Craig have at her school?

A. Unfair rules.

Q. What do you mean by unfair rules?

A. Well, she wouldn't play something fair. She would make up her own rules. Like when we were outside playing house, she'd say, I'm going to be the mother and then she said that the mother gets to tell everybody what to do and that wasn't fair because we already had a mother.

Q. What rules did she have for the children?

A. (Unable to understand)

Q. What would be the rule about hurting other kids?

A. The rule would be that you have to do something to them.

Q. Something nice or something bad?

A. Bad.

Q. Brooke, why didn't you go home right away when these things happened and tell your mom and tell your dad?

A. Because I was scared.

Q. Why were you scared? What did Mrs. Craig say to make you scared?

A. Well, she said that my parents wouldn't love me any [1-69] more.

Q. What else did she say to make you scared?

A. She said my parents would get a divorce.

Q. Did she say anything else to make you scared?

A. Yes.

Q. What else did she say to make you scared?

A. She said that she would kill me.

Q. How did that make you feel?

A. Scared.

Q. What names did Mrs. Craig call you?

A. One of the names that I've never heard before.

Q. What was that?

A. Child bitch. It just never appeared to be a name that I've ever heard.

Q. What was that again.

A. Child bitch.

Q. What other names did she call you?

A. Stupid.

Q. Anything else, yes or no?

A. Yes.

Q. What?

A. And dumb.

Q. What was your answer? I didn't hear you, Brooke.

A. And dumb.

Q. Dumb?

[1-70] A. Um huh.

Q. How do those names make you feel?

A. I don't know. Just made me feel different.

Q. How did Mrs. Craig treat animals?

A. Bad.

Q. Tell Mr. Kolodner and I about how she treated animals.

A. Bad.

Q. What animals did you see at Mrs. Craig's school?

A. Possum, rabbit and . . . now, what was that other thing.

Q. Tell me about the rabbit.

A. Well she . . . well she took a hammer and she hurt the bunny. She put the thing on it.

Q. What do you mean, she put the thing on it? What do you mean by that? Explain that to me a little bit better.

A. Well, she put . . . whatever that thing is called on the . . . on the rabbit.

Q. And what happened to the rabbit?

A. And it just couldn't breathe anymore.

Q. Who saw that happen to the rabbit?

A. The kids.

Q. Where was that rabbit at the school?

A. Outside.

Q. Where outside? Do you remember?

A. Uh uh.

[1-71] Q. Tell Mr. Kolodner and I about the possum.

A. There was a possum in the trash can and Mrs. Craig made it dizzy sort of.

Q. What do you mean? Explain to us by what you mean by made it dizzy sort of. Explain that better, Brooke.

A. Well, she just rolled it around in the trash can.

Q. Who watched that?

A. The kids.

Q. How did that make you feel inside?

A. Like the possum would.

Q. Brooke, why did you finally tell about what happened in Mrs. Craig's school? Explain that to us, would you?

A. Well because it just appeared to me that if I kept this inside I just . . . it just would hurt me more.

Q. And who did you tell?

A. My mom and my dad, but lastly my mom.

Q. And after you told your mom and dad you told some other people too, didn't you?

A. I told my grandma and that's mostly who I told. I told Mary, I told Joe.

Q. Who is Mary?

A. Mary Burke.

Q. You told police officer Beth,didn't you?

A. Yeah, I told her.

Q. And you told me, didn't you?

[1-72] A. Yes.

MS. O'DONNELL: Mr. Kolodner, you can have the witness to question, I've finished. Thank you.

CROSS EXAMINATION

BY MR. KOLODNER:

Q. That's a pretty dress you have on.

A. Thank you.

Q. That was a pretty jacket you had on when you came in. Who gave you that jacket?

A. My uncle.

Q. Where is that jacket? Could you get the jacket for us, sir?

MS. O'DONNELL: For the record, the camera technician is going to the Judge's ante-chamber to retrieve the jacket that is near Judge Kane's secretary's desk.

Q. It's a beautiful jacket. Put it on. Let me see how pretty you look with it. Oh my, that looks good. What is that, what does it say?

A. That's my name.

Q. What's that say? I can't see from here.

A. Brooke.

Q. Oh, Brooke. And what does that say?

A. It says the same thing except it's in Korean.

Q. Oh, what does that say? Brooke too?

A. Yeah.

[1-73] Q. That says it in Korean. What's on the back of your jacket?

A. It says Korea.

Q. So you were born in Korea?

A. (No audible response)

Q. What did you say your full name was?

A. Brooke Etze.

Q. Now, what's your middle name?

A. Su Jin.

Q. Su Jin, that means Brooke in Korean?

A. Yes.

Q. I see. How long did you go to Mrs. Craig's school?

A. Well, a long time.

Q. A long time.

A. Probably for two years or so.

Q. I didn't hear what you said, Brooke.

A. Probably for two years.

Q. For two years. There were many times when you had a good time there weren't there?

A. No.

Q. You never had a good time there?

A. No.

Q. Was it always bad there?

A. Yes.

Q. Did anyone tell you to say that it was bad there?

[1-74] A. No.

Q. Some people . . . some people tell you?

A. No. It just was bad to me.

Q. Have you ever been in this room before?

A. Yes.

Q. How many times have you been in this room?

A. A few times.

Q. Now you counted for the Judge up to twenty. Can you count up to twenty?

A. (No oral response)

Q. Let's hear you count to twenty again.

A. 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20.

Q. That's very good. That's very good. Now, you said you've been in this room before and you said a few times and you can count up to twenty, how many times would you say that you have been in this room?

A. Two.

Q. Two times. When were you in here last?

A. The time I was visiting.

Q. Visiting with whom?

A. Kate.

Q. Kate. Do you mean Kate O'Donnell, the lady that's sitting here?

A. Yeah.

Q. Alright, now when was that?

[1-75] A. Well, a little while ago.

Q. Today or another day?

A. Another day.

Q. And you were brought in here?

A. Yes.

Q. Were you asked some questions when you were brought in here?

A. No, but she told me a little bit about it.

Q. What did she tell you?

A. Well she told me that the Judge would be sitting here asking me a few questions - what's my name and how I am, where I go and all that.

Q. The questions that . . . like you were asked here today, is that right?

A. Yes.

Q. So that you would know what questions you were going to be asked?

A. Yes.

Q. And you were here on another time you said?

A. Yes.

Q. And who brought you here then?

A. Kate.

Q. How long ago was that?

A. On Friday. I mean Kate . . . oh, that was a few weeks ago, on Tuesday. One day was on Friday and the other day was [1-76] on Tuesday.

Q. So a few weeks ago you were brought in this same room, is that right?

A. Um huh.

Q. And you were told what questions were going to be asked of you then?

A. Yeah.

Q. Who . . . who told you what questions were going to be asked of you?

A. Oh, that's a toughy.

Q. Well, it was either your mother or Kate, right?

MS. O'DONNELL: Objection

Q. You shook your head.

THE COURT: Counsel, I overrule the objection.

Q. You said it was either your mom or Kate, right, because they're the only ones that brought you here, isn't that right?

A. Yes.

Q. Alright, so you don't remember which one told you?

A. No.

Q. But you were told the questions that you were going to be asked?

A. Yes.

Q. And were you told the answers that you were supposed to say?

[1-77] A. No.

Q. Now, after each time that you came here, did you get a gift or present or a reward?

A. No.

Q. You got some ice cream, didn't you?

A. No.

Q. Didn't you get some ice cream?

A. No. I can't eat ice cream.

Q. Why?

A. Because I went to the doctor's and I had some stomach aches and I just can't eat milk . . . I can't drink milk or eat something that has milk.

Q. Is that just recently?

A. Yes.

Q. I see, but before you had ice cream, right?

A. Yeah.

Q. And you were rewarded with ice cream in the past, isn't that right?

A. (No oral response)

Q. You're shaking your head yes?

A. Yes.

Q. Okay.

A. I wasn't rewarded for ice cream or any of that stuff when I came here.

Q. Well how about in the other office that you were [1-78] taken to, you were at the other office . . . Kate's other office were you not?

A. Yes.

Q. How many times were you there?

A. Oh, let me see, three times.

Q. Three times. Alright, during those times you were told what questions would be asked of you, right?

A. I'm not sure.

Q. What did you do there three other times in Kate's office?

A. Well, Kate introduced me to people and she showed me around a little bit. That's mostly what we did. Then we came up to the court house.

Q. Those three other times you came up to the court house?

A. Only two times.

Q. Two times. Three times . . . three times . . . let's get it straight because I'm a little mixed up. You . . . you were in Kate's office three times, right? Three times, correct?

A. No, I was in here two times.

Q. Oh, in this office where we are now by this table or this desk, two times?

A. Yeah.

Q. Okay. Sometimes you got rewards for telling certain answers, didn't you?

[1-79] A. I don't understand.

Q. Okay, well, if . . . if you told the answers that satisfied your mommy, she gave you a present, didn't she?

MS. O'DONNELL: Objection.

THE COURT: I overrule the objection.

A. Not always.

Q. But sometimes?

A. Yeah.

Q. Sometimes. So when you would say the things she wanted you to say, after you left here, she would give you a gift, right?

A. Well, she would give me a kiss or a hug.

Q. And she didn't like it when you didn't say the answers she wanted, isn't that right?

A. Sometimes, not always.

Q. Did she ground you . . . did she ground you once?

A. Yeah, once.

Q. For not saying the right answers, isn't that right?

A. No, for doing something else.

Q. What was that?

A. Well, for telling a lie.

Q. What was that lie?

A. When Natalie broke my tape.

Q. Broke your teeth?

A. My tape.

[1-80] Q. Tape.

A. It's not . . . it's not the kind that you fix something with. The kind that you play in the tape recorder.

Q. Oh, I see. You said that Natalie broke it, but she really didn't did she?

A. No.

Q. But you lied, didn't you?

A. Yes.

Q. Told a fib, huh?

A. Yes.

Q. And your mom grounded you?

A. Um huh.

Q. Do you get grounded a lot?

A. No.

Q. But you have been grounded some times?

A. Yeah.

Q. When was the last time you were grounded?

A. Oh, last year when mommy couldn't understand anything about Mrs. Craig's.

Q. And then when you made mommy understand and you told mommy what she wanted to hear, then she didn't ground you anymore, is that right?

A. Yes.

Q. I see. And, why did you say a lie about Natalie? Did you like her?

[1-81] A. Yes I like her, but I just didn't want to get in trouble.

Q. You wanted to get her in trouble though, huh? Is that right?

A. Yes.

Q. So you told something that wasn't true in order to get Natalie in trouble, is that right?

A. Yes.

Q. How did your mom find out about it?

A. I told her.

Q. You finally told her, huh?

A. Yeah.

Q. Well, it bothered you I guess that you told a fib, huh?

A. That's the only time I got grounded.

Q. So, now, if I told you that I was superman, would that be true?

A. No.

Q. (Inaudible) like superman, don't you? You know that. Now, if I gave you a present and said I was superman, then would you say I was superman?

A. No.

Q. Do you like this doll?

A. Yes.

Q. Isn't that a pretty doll, huh?

[1-82] A. Yes.

Q. If I said I am going to give this to you if you say I'm superman, would you say superman then?

A. No.

Q. I will give you the doll anyway because I think you're so pretty.

A. Thank you.

Q. Now, I want to ask you a few more questions. You . . . you mentioned that Mrs. Craig hit you with a stick.

A. Yes.

Q. Is that really true, Brooke?

A. Yes.

Q. Truth?

A. Yes.

Q. And where did she hit you?

A. In my private.

Q. Where did you learn the word private? Did someone tell you to use that word?

A. No.

Q. Well, how did you know to use the word private?

A. Well, my mommy just so much talked about private . . .

Q. Your mom . . .

A. . . . just . . . it just . . .

Q. . . . your mom talked about it as a private and that's how you got to know the word private, right?

[1-83] A. Um huh. It's in every story.

Q. It's in every story your mom tells you?

A. Um huh.

Q. When did your mom start telling you stories about privates?

A. Well, she didn't, she just mentioned a lot about my privates since I've told . . . she mentioned a lot about them because I told a lot about my privates.

Q. And she told you to use that word, is that right, for that area, is that what you mean?

A. I mean she . . . she asked a lot about my privates. First she said did Mrs. Craig hurt you in your privates a lot of times and it just appeared. I don't know how it meant my private parts, but I just (inaudible) in like my privates.

Q. Because she kept asking you that question about your privates . . .

A. Over and over.

Q. . . . that's why you . . . over and over, is that what you just said?

A. Yeah.

Q. Over and over. And then you got to learn to use that word private, is that correct?

A. Yes.

Q. Now, did . . . you say your mother asked you this a lot [1-84] of times, is that right?

A. Yes.

Q. A whole lot of times.

A. Yes.

MS. O'DONNELL: Objection.

THE COURT: I'll overrule the objection.

BY MR. KOLODNER:

Q. Did . . . you mentioned that . . . that you've . . . that Mrs. Craig had thumb tacks, is that what you said?

A. Yes.

Q. And now, what . . . tell me just what she did with the thumb tacks.

A. Well, she made little holes on her hands sometimes to make them look like spider bites.

Q. She would make little holes in your hands?

A. Yes, to make them look like spider bites.

Q. Would your hands bleed?

A. No.

Q. No.

A. Just little prickies.

Q. Little prickies.

A. Yes.

Q. Was that on the back or the front of your hands?

A. Just the front.

Q. And who called them spider bites?

[1-85] A. Mrs. Craig.

Q. I see. Now, did Mrs. Craig use that stick on your private a lot?

A. Yes.

Q. Now you counted before up to twenty for me and you counted up to twenty for the Judge before so you're good at counting, right?

A. Yeah.

Q. How many times would you say that she used that stick on you?

A. Well, about a lot of times.

Q. Could you tell me in numbers what the amount a lot . . .

MS. O'DONNELL: Objection. She answered the question.

A. Well . . .

THE COURT: I'll overrule the objection.

Q. You may answer the question.

A. She . . . she probably did it . . . I don't know how many times, but she did it a lot.

Q. A lot. More than once then?

A. Yeah, more than once.

Q. And would the stick go into your body?

A. No, she just touched me somewhere where I didn't like to be touched.

Q. But the stick never went inside your body?

[1-86] A. No.

Q. Never, right?

A. Right.

Q. Now you're sure?

A. Yes.

Q. Okay, so the stick never went into your body?

A. Right.

Q. But you had trouble, didn't you, with some other people with a stick like . . . do you know Todd and Salem? Do you know Todd?

A. Yeah.

Q. Who is Todd?

A. He . . . he's Salem's brother.

Q. And did Todd and Salem go to Craig's also?

A. Yes.

Q. Um huh. Were they about your age?

A. No. Todd was younger than me, he's four, and . . . five, and Salem was older than me. He was six.

Q. Now did they bother you with sticks sometimes?

A. No, they just bothered me by . . . they were after . . . boys chase girls and girls chase boys.

Q. Were they after you?

A. Yeah! Four people loved me at that school.

Q. Four people loved you?

A. Yeah.

[1-87] Q. Who were they?

A. Well, I mean only three people - Todd, Salem and Zachery.

Q. Todd, Salem and Zachery, they loved you, right?

A. Yeah.

Q. They told you this, huh?

A. Um huh.

Q. And . . . but sometimes you had a little trouble with Todd and Salem with sticks, didn't you?

A. Yeah.

Q. Okay, because they . . .

A. Sometimes they would throw them.

Q. Didn't you tell your mom that sometimes Todd and Salem would touch you in your privates with the stick too?

A. No.

Q. Didn't you tell your mom that?

A. No, they never did that. They would just throw the stick.

Q. What would they do with the sticks?

A. They'd just wave them back and forth and they would just play rough with me sometimes.

Q. And where would they hit you with the sticks?

A. They would never hit me with them.

Q. Well, you had a little trouble with Todd and Salem with the tacks too, didn't you?

[1-88] A. No.

Q. Didn't they put tacks on the sliding board?

A. No.

Q. Didn't you tell your mom that?

A. No.

Q. You never told her that?

A. They didn't do it.

Q. But you did tell her that, right?

A. No.

Q. So Todd . . . never . . . you never told your mom that Todd and Salem put tacks on the sliding board?

A. They never did that.

Q. Well, I know they didn't do it, but once you said it to your mom, didn't you?

A. No.

Q. Didn't you tell your mom once that Salem or Todd stuck you between your legs with the stick?

A. No.

Q. You never said that?

A. (No oral response)

Q. Now, you mentioned a rabbit before.

A. Yes.

Q. What happened . . . what happened to the rabbit?

A. She killed it.

Q. When you say she, who is she?

[1-89] A. Mrs. Craig.

Q. What did she use to kill it?

A. I'm forgetting. A hammer.

Q. A hammer?

A. Yeah.

Q. Is that what you just said?

A. Yes.

Q. What did she . . . take and hit it and rammed it with a hammer?

A. Huh huh, she put it on top of the rabbit.

Q. And killed the rabbit with the hammer?

A. Part of it's heavy in the front and in the back part it's light because it was plastic.

Q. Um huh. And did she hit the rabbit with the part . . .

A. No, she . . .

Q. . . . the heavy part?

A. Yes.

Q. And that's how the rabbit died, is that right?

A. Yes.

Q. Did the rabbit bleed a little bit?

A. No, just stopped breathing.

Q. Did she hit it a lot . . . a lot of times with the hammer?

A. Once.

Q. Once. Did you ever tell your mom . . . do you know a [1-90] Katie Heacock?

A. Yes.

Q. Who is she?

A. She's somebody who went to Mrs. Craig's school.

Q. How old is she?

A. I'm not sure.

Q. Is she younger than you?

A. No, she's much . . . yeah, yeah, she's probably . . . yeah, I know how old she is. By now she's four years old.

Q. I see. Did you tell your mom that Mrs. Craig hit her with a rock?

A. Yes.

Q. And she almost died, isn't that what you told your mom?

A. No, she hit her with a rock, but she never fell or anything. That's strange.

Q. Hit her in the chest, isn't that right?

A. No.

Q. Huh?

A. On her leg.

Q. On her leg. I thought you told your mom that she hit her in the chest with a rock?

A. No.

Q. You never said that?

A. (No oral response)

[1-91] Q. You never said that?

A. No.

Q. Did you say that Katie almost died?

A. No.

Q. You never said that?

A. No.

Q. You never told your mom that Katie was hit in the chest with a big rock by Mrs. Craig . . .

A. No, I didn't say rock.

Q. . . . and she almost died?

A. Almost the size of an egg.

Q. And that she almost died?

A. She . . . she . . . I never told her that. I wasn't sure.

Q. That wasn't true, okay. Now, did Salem and Todd put thumb tacks on the chairs. They did that sometimes, didn't they?

A. No.

Q. You never told anyone that Salem and Todd put tacks on the chairs?

A. No.

Q. Well, do you know Mary Burke?

A. Yes.

Q. And who's Mary Burke?

A. She's my . . . she's a friend of mine.

Q. And you've been to see her a lot of times, haven't [1-92] you?

A. Yes.

Q. She's very nice?

A. Yeah.

Q. And, I have something else for you. Where did you say you were born?

A. In Korea.

Q. Is that a Korean baby?

A. (No oral response)

Q. Sure looks like it, doesn't it?

A. Yes.

A. Yes.

Q. She's pretty, isn't she?

A. Yes.

Q. Not quite as pretty as you though, but she's pretty, right?

A. Yes

Q. Well, you've been a real good girl and I'm going to give you this present. Do you like that one?

A. Yes.

Q. That's good. That's . . . now you've got a Korean doll.

A. I'm a collector of dolls.

Q. Are you really?

A. Um huh.

Q. How many do you have?

A. One just broke.

[1-93] Q. Oh, that's terrible. What did it drop on the ground?

A. No, we were at hands on science and my friend just lifted it up and then had fell on the floor.

Q. The head fell off? Oh, that's terrible. You can get that fixed, can't you?

A. Yeah. I can glue it back on.

Q. Oh, sure. You can take care of that.

A. 'cause we know somebody who fixes dolls.

Q. Oh, so you can take it to the doll hospital, right?

A. (No oral response)

Q. Sure, I know you knew about that. I'd like to ask you about Mary Burke. Mary Burke . . . you went to see her a lot of times, didn't you?

A. Yes.

Q. Now, remember we counted up to twenty before.

A. Yes.

Q. You're good at that.

A. Yeah.

Q. You did it for the Judge and you did it for me. Now, did you see Mary Burke twenty times?

A. I saw her a lot of times.

Q. Do you think that you saw her twenty times?

A. I saw her a lot of times. I'm not sure how many times I saw her, but I saw her a lot of times.

[1-94] Q. A lot of times. A lot more than you saw Kate, correct?

A. I saw Kate less more, but I saw . . . she began to come when I told a little more.

Q. You mean the more you told her the more she would come, right?

A. Yeah.

Q. And she asked you a lot of questions didn't she?

A. Yes.

Q. A lot of questions. She wanted to talk all about Mrs. Craig, didn't she?

A. Yes.

Q. Did she tell you you were coming here today?

A. My mom and dad told me that too.

Q. And so . . . so Kate told you . . .

A. And my parents told me.

Q. Your mom and dad told you and Mary Burke told you, right?

A. Yes.

Q. And Mary Burke told you what kind of questions were going to be asked you here, right?

A. No.

Q. Now, did Mary Burke sometimes tell you that Mrs. Craig was bad?

A. I'm not really sure.

[1-95] Q. But she may have, huh?

A. Yeah, and she may not have.

Q. But you're not sure.

A. No, I'm not sure.

Q. But Mary Burke wanted you to tell her all about the bad things about Mrs. Craig, didn't she?

A. Yes.

Q. She . . . almost every time you went there I bet you she asked you about the bad things about Mrs. Craig, didn't she?

A. Not all the time, sometimes.

Q. Almost all the time though?

A. Yeah.

Q. Almost all the time though, right?

A. Yeah.

Q. And . . . and when you would tell Mary Burke the bad things about Mrs. Craig, your mom liked that, didn't she?

A. No. I mean yes.

Q. Okay, and then sometimes . . . at that time you could eat ice cream, couldn't you?

A. Yes.

Q. And when you'd say bad things about Mrs. Craig you were rewarded with ice cream then, weren't you?

A. Well, not all the time just sometimes.

Q. Sometimes, sometimes. Alright . . .

[1-96] A. Sometimes my mom would give me a treat for telling me a lot of it.

Q. Uh huh.

A. She'd let me pick something.

Q. She'd let you pick something out, huh?

A. Yeah.

Q. So it didn't have to be ice cream it could have been something else?

A. Yeah.

Q. So you'd always get a treat for saying something bad about Mrs. Craig, right?

A. Well, I would not always, just sometimes.

Q. Just sometimes. Okay. Because sometimes you would tell some of the children on your bus that you go to school with. So whenever you said something bad about Mrs. Craig you were given a treat. Didn't you tell some of the kids?

A. No.

Q. No.

A. My mom said, to not tell anyone because she just thinks that it's not very good to tell other kids about something. But there's only one thing you can tell about, only if you need to, is if you need somebody to help you you can tell them to help you, but that's not what . . . that's not what my mom means. She means to tell people that I trusted her.

[1-97] Q. But your mom was real happy when you spoke about Mrs. Craig and the bad things, right?

A. Yes.

Q. Okay, and sometimes you were grounded if you didn't say something bad about Mrs. Craig, right?

A. No.

Q. Once.

A. Yes.

Q. Once . . .

A. That was about somebody else.

Q. Oh, who was that about?

A. Natalie Baker.

Q. What about Natalie Baker? Who is she?

A. She's my best friend and we both play together.

Q. What did you say something bad about Natalie?

A. No, I said that she broke my tape and she hid it in my closet.

Q. And that's . . .

A. And that wasn't . . .

Q. . . . that didn't happen . . .

A. I broke it.

Q. I see. And you made that lie up yourself?

A. Um huh.

Q. You figured . . . you thought it up yourself to say Natalie did it, huh?

[1-98] A. Yeah.

Q. And then did Natalie get in any trouble?

A. No.

Q. And what . . . what did you tell your mom again? You said that Natalie broke the tape and hid it in your closet?

A. Yes.

Q. Well, did anyone hide it in your closet?

A. I did.

Q. Oh, you did. And . . .

A. Natalie didn't break the tape . . .

Q. Oh.

A. . . . I broke the tape, I hid it . . .

Q. That's what you said . . .

A. . . . and told my mom a fib.

Q. Alright, but you said that Natalie did it?

A. Yes.

Q. I see. You told her that Natalie did it because you didn't want . . .

A. To get in trouble.

Q. . . . to get in trouble, but your mom found out anyway, didn't she?

A. (No oral response)

Q. She said it doesn't really pay to lie, does it?

A. No.

Q. You must tell the truth, right?

[1-99] A. Yes.

Q. Now, did Mary Burke tell you to say bad things about Craig's School?

A. No.

Q. She liked it though when you said bad things about the school, right?

A. She just likes me to talk about it.

Q. Did she ever bring you to this courtroom . . . to this room here?

A. No. Kate and my mom did. My mom only came once.

Q. And Kate brought you twice?

A. Yeah. Kate went with us, my mommy went too.

Q. I see. Now think again, Brooke, did you ever tell anyone . . . that Todd or Salem punched you with the stick between your legs. Try to think that maybe you told your mom. Do you remember, maybe you told her that Salem or Todd punched you between your legs with the stick?

A. I can't remember. That's one that I can't remember. The only thing I . . . I have to say I never do remember them doing it.

Q. Do you remember them putting tacks on the sliding board?

MS. O'DONNELL: Objection. Your Honor, that's been answered.

THE COURT: I'll sustain the objection.

[1-100] A. No.

Q. Did you ever talk to Mr. Warfield?

A. (No oral response)

Q. Do you know Mr. Warfield?

A. I know who he is, but I just . . . oh, yeah, I never talked to him. He always says hi and goodbye and all that. I just sometimes talked to him, but not always.

Q. Did he ever ask you any questions?

A. No.

Q. Did he ever bring you to this room before?

A. No.

Q. Now, you mentioned that you would get grounded when you would tell a lie. When was the last time you got grounded?

A. I only got grounded once.

Q. What was your punishment.

A. The punishment was I broke the tape and I told a lie.

Q. Did mommy make you stay in your room?

A. She always made me stay in my room.

Q. How long was that?

A. For ten minutes.

Q. Ten minutes.

A. I think ten or twelve.

Q. Okay. That was . . . that was plenty bad. Now, how about all the other times you were grounded, what punishment did you get?

[1-101] A. Hum, that's a tough one. I'm not sure.

Q. You forgot what punishment it was, but you were grounded before?

A. Yeah. I've learned my lesson.

Q. Because you've been grounded pretty many times, huh?

A. Yeah.

Q. It doesn't pay to tell fibs, does it?

A. No.

Q. So you say you've learned your lesson now that you've told so many fibs, right?

A. Yes.

MS. O'DONNELL: Objection.

THE COURT: Sustain the obejection.

Q. Did you ever tell what is known as a white lie?

A. What's a white lie?

Q. You don't know what a white lie is?

A. No.

Q. Just a little fib.

A. No, I've never done that. I've made big fibs up before (inaudible).

Q. So you tell big fibs. Are you shaking your head yes?

A. Yes I tell fibs.

Q. Did anyone mention my name to you before today?

A. Kate.

[1-102] Q. Kate said . . .

A. She mentioned a little bit about you.

Q. She told you about me, right?

A. Yeah.

Q. She told you that I was Mrs. Craig's lawyer, right?

A. Yes.

Q. Alright.

A. Also my parents told me.

Q. They told you about it too?

A. Yes.

Q. So before you got here you knew who I was?

A. Yeah. I just thought you would look like that.

(LAUGHTER IN COURTROOM)

Q. I hope I didn't frighten you too much.

A. No.

Q. No, that's good.

A. You're nice.

Q. I'm nice.

A. Yeah, even though you're Mrs. Craig's lawyer.

Q. Ah, that's nice of you to say that because I think you're a very nice little girl. You're very pretty.

A. Thank you.

Q. I'm worried about that doll, but I know you can fix it up, can't you?

A. Yes, don't worry, she'll be new.

[1-103] Q. The doll hospital will fix it up.

A. Yes.

Q. Did your mommy tell you that I would ask you bad things?

A. No.

Q. Have you ever touched yourself between your legs, Brooke?

A. No.

Q. Did you ever put a pen or pencil there?

A. No.

Q. Any other kind of object?

A. No.

Q. Did you know Chris?

A. Chris who?

Q. Do you know any boy by the name of Chris?

A. (No oral response)

Q. You're shaking your head.

A. Yes.

Q. Yes. Who was Chris?

A. The only Chris I know is Chris Hill.

Q. Is he . . . did he go to Craig's school too?

A. No.

Q. Now who is Chris Hill?

A. He's my friend. He goes to my school now. He used to not go to my school, now he does go to my school.

[1-104] Q. He bit you once, didn't he?

A. No.

Q. He didn't?

A. No.

Q. Didn't you tell your mother once that he bit you on your private?

A. No.

Q. You never told her that?

A. No, he never did that.

Q. Maybe you fibbed when you told her?

A. I . . . he never did that.

Q. Well, did you ever tell her that he did . . . that he did that?

A. He never did that.

Q. Okay, well, let's say he never did it, but did you ever say that he did do it?

A. No.

Q. I'm going to show you a picture. Who's that picture of?

A. That's me.

Q. Is that you?

A. Yes.

Q. What are you doing there?

A. We're sliding down the sliding board.

Q. Did anyone ever put tacks on that sliding board?

[1-105] A. No.

Q. No.

A. But if somebody would put tacks on the sliding board I would have saw them. Nobody ever did that.

Q. Now, I show you another picture.

MS. O'DONNELL: The State has no objection to the time, subject to identification and marking this for an exhibit.

MR. KOLODNER: I'm not sure how we're going to go about that. We'll do that when it comes.

Q. Now I show you that picture. Do you see yourself on that picture?

A. Yes.

Q. And you're smiling there, you look pretty there, don't you?

A. Yeah.

Q. Who are the two ladies standing on each end of the picture?

A. This isn't a lady, that's a cake.

Q. On that . . . that lady there with the white blouse on.

A. That's Miss Caroline.

Q. Miss Caroline. Is she a teacher?

A. Yes.

Q. Okay and on the other end of the picture who is that?

A. Miss Tessie, she was my piano teacher.

[1-106] Q. She was your piano teacher?

A. Yes.

Q. Okay. You look real happy there.

A. Yes.

Q. Were you happy?

A. Oh, and that's Miss Alise.

Q. That's Miss Alise.

A. Yes.

Q. That's her here. Where you real happy?

A. It felt like I had to be happy. Sometimes I had to be happy so I just seemed like . . . I just acted like I was happy. So I didn't want anybody to know this.

Q. Alright, I'm going to show you another picture. Do you see yourself on that picture?

A. Yes.

Q. And who else . . . what adults are on that picture?

A. Ah, what is her name again?

Q. Was she a teacher?

A. Yeah, this one.

Q. Her indicating the lady setting down . . .

A. Yes.

Q. . . . with a dress on, right?

A. Yeah.

Q. And on the other end of the picture is who?

A. That's Mrs. Craig. She never wore this. I never [1-107] saw her in that. She wore . . . most of the times when

I saw her she wore dressier . . . more dressier clothes, but I never saw her wear that. I can recognize three people . . . no, four people. I know these . . . I know Brice, that's me, that's Randy and I forget his name. I know him, but I forgot his name.

Q. Okay. Now, when was the first time that Mrs. Craig struck you?

A. What do you mean?

Q. Well, struck you either with a stick or her with [sic] hand or with anything else?

A. Well, she hardly ever struck me except in my privates.

Q. And that was a lot of times you say?

A. Yes.

Q. Do you remember was it when you first came to this school, or was it after you had been there a long time?

A. After I had been there a long time.

Q. Were you in . . . had you been there to graduate?

A. Yes.

Q. And she struck you before you graduated?

A. She never struck me . . .

Q. Okay, and with this stick . . .

A. . . . except on my privates.

Q. . . . had she used the stick before you graduated the [1-108] first time?

A. Yes.

Q. And you never said anything to your mommy or daddy?

A. No.

Q. And all the times that she used it, you never told the bus driver, you never told anybody?

A. I never remember a bus driver. That must be the hardest part.

Q. What's that?

A. Remembering my bus driver. I just wish I had a picture of her, just one.

Q. When did you decide to tell . . . who did you tell first?

A. My dad. I guess I told him first.

Q. What did you tell him?

A. I told him that . . . I told him a lot of things first which I can't remember, but I told him a lot of things before I told . . .

Q. But you can't remember what you told your dad? Are you shaking your head no?

A. Yes, I'm shaking my head no.

Q. Now, tell me what you did tell your dad.

A. Well, I told my dad that . . . that's a toughy. I told him a lot of things, but I can't remember. I can't remember. I know I told him a lot before I told my mom most.

Q. But then you began talking to your mom more than to [1-109] your dad, is that right?

A. Yes. Whenever she picked me up, I just would say I had a good day and I can't remember anything from kindergarten and kept . . . and I complained to them and I can't . . . I can't remember anything from kindergarten.

Q. You complained to them that you couldn't remember anything?

A. Yeah, and I said it was a hard day in kindergarten and at the school and I told them that, but she never could believe.

Q. So you told your dad and he wouldn't believe you?

A. He wouldn't believe me.

Q. And you told him about the stick and he wouldn't believe you . . .

MS. O'DONNELL: Objection.

A. Um hum. I told him about everything I could.

Q. Did he tell you he didn't believe you?

A. He never told me, I just knew he wouldn't believe me.

Q. Is that why you didn't tell him in the first place?

A. Yes.

Q. How many times would you say that you told your dad?

A. I told him nothing, except when I started to tell.

Q. And he wouldn't believe you?

A. Yes.

[1-110] Q. Did you say he didn't believe you because sometimes you didn't always tell him the truth?

MS. O'DONNELL: Objection.

A. I just knew he didn't believe me.

THE COURT: Counsel, approach the bench now please.

MS. O'DONNELL: Brooke, wait here until we get back, okay.

THE WITNESS: Yes.

(SOUND PULLED ON VIDEO TAPE)

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: We're going to have some way when I . . . you note an objection that he turns the sound or something. I'm going to overrule the objection, but we're having a problem. When somebody notes an objection, maybe we ought to keep quiet for a minute and I guess we ought to have somebody to have Mr. Pruitt pull the plug or something as we're still getting audio. So when there's an objection . . .

MR KOLODNER: Just pause.

THE COURT: . . . just pause.

MR. KOLODNER: Okay.

THE COURT: Can you hear me coming through here?

MS. O'DONNELL: Yes.

THE COURT: I get a feedback.

MS. O'DONNELL: We get a little feedback noise.

MR. KOLODNER: Yeah, it's like a screeching noise like.

[1-111] THE COURT: But you can hear me when I push that button?

MR. KOLODNER: Well, did you just . . . you just pushed it. We heard you say come in, but before that it was like a screeching noise.

MS. O'DONNELL: There's a screech and then your voice.

THE COURT: Apparently the screech . . .

MS. O'DONNELL: That's something that happens every time. That's the feedback.

THE COURT: Alright. Make sure . . . I will permit you to . . . to . . . when you go back to suggest to Mr. Pruitt or Sheriff Pruitt that when an objection is noted

you all are to keep quiet and he should pull a plug or something for the time being until I . . .

MR. KOLODNER: Well, how will we know what to do after that . . . what you decide to . . .

THE COURT: Because you'll hear me speak.

MR. KOLODNER: Oh, okay.

THE COURT: I'll say sustained to overrule.

MR. KOLODNER: Okay, okay, right.

THE COURT: Can I ask one other thing?

MR. KOLODNER: Yes.

THE COURT: Can I ask you one other thing. I don't want to ask the child any questions. For the purposes of [1-112] clarity I would hope somebody would ask the child that on the one or two occasions, on perhaps on redirect or something, when the child was brought to the Judge's chambers, that the Judge wasn't there.

MS. O'DONNELL: I will make . . . I had planned to do that.

THE COURT: I would be distressed if this jury thought I was there two or three weeks ago and the State's Attorney . . .

MR. KOLODNER: (Inaudible) Yeah, okay, I'll bring that up and I'll make it clear.

THE COURT: Anybody can. Okay.

MR. KOLODNER: Okay, okay.

THE COURT: I mean other than the fact that . . .

MR. KOLODNER: I will make that clear.

THE COURT: . . . and if . . . if need be, you know, we can tell the jury that, I don't think it's necessary, that . . .

MR. KOLODNER: No, I'll make it clear.

THE COURT: . . . prior to . . . to you all questioning the child I did so also, but . . . okay.

MS. O'DONNELL: Yes, Your Honor.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:

MR. KOLODNER: If it please the court, I have been [1-113] informed by counsel who was in the courtroom and sitting next to the client that the client has on occasion tried to reach me by phone and has been unable to reach me by phone.

THE COURT: Then I would just suggest to counsel that he interrupt these proceedings and tell me that if that's the case.

MR. KOLODNER: Whenever that occurs just say it right then at that time then you'll be given an opportunity to (inaudible).

THE COURT: Again, we're adhering to the same procedure that we had adherred [sic] to before namely, counsel's communicating. Mr. Hurt is communicating, or at least has a phone available to him to communicate with Mr. Kolodner. I have instructed in the courtroom, Mr. Hurt, that if for some reason he can't reach Mr. Kolodner, he just interrupt these proceedings and bring it to my attention. Are there any other preliminary matters, counsel?

MS. O'DONNELL: Alright, let's go back.

(COUNSEL APPROACHED THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

BY MR. KOLODNER:

Q. Brooke, when you came to this room last week and before that with Kate . . . Kate and your mother.

A. Yeah.

Q. . . . the Judge wasn't here, isn't that right?

[1-114] A. Yes.

Q. When you say yes, you mean he was not here, is that right?

A. Yes.

Q. Okay. Today is the first time you ever spoke to that Judge, isn't that correct?

A. Yes.

Q. Did you tell your dad about the spider bites?

A. No.

Q. Just about the stick?

A. I told my mom and dad a lot of things, but mostly about the stick.

Q. And your dad didn't believe you, right?

A. He didn't believe me on the part where I can't remember anything from kindergarten and from Mrs. Craig's. That's the part he can't believe me on, but he can believe me on the stick.

Q. Is that what he said?

A. Yes.

Q. Okay, you've been a very good little girls and I don't have any more questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Brooke, I have a couple of questions more to ask, okay?

[1-115] A. Yes.

Q. First of all, Mr. Kolodner asked you a lot of questions about a person named Mary Burke, didn't he?

THE COURT: Apparently counsel wishes to confer with Mr. Kolodner.

(Mr. Hirt and Mr. Kolodner confer by way of phone)

MR. KOLODNER: Can Your Honor hear me.

THE COURT: Yes.

MR. KOLODNER: Okay. The defendant has stated that she has tried to reach me by telephone and was unable to when it was malfunctioning and has given me several questions to ask and I ask permission to ask those questions at this time.

THE COURT: You may do so.

CROSS-EXAMINATION CONTINUES

BY MR. KOLODNER:

Q. Did you—Brooke, did you ever show the spider bites to any of the other children?

A. No.

Q. How come?

A. Because we all got them?

Q. All the kids got the spider bites.

A. Yes. Whatever she did to somebody else, she would do to all the other kids.

[1-116] Q. Can you give me the names of some of the other kids that got spider bites?

A. Stacy, Shannon, Stephanie, Mandy.

Q. Okay, Stacy——

A. Um-hum.

Q. —Shannon. What's Stacy's last name, do you know?

A. Stacy Myers.

Q. Stacy Myers and Shannon, what's her name?

A. I forgot her last name.

Q. Okay, Shannon, and who else?

A. Stephanie.

Q. Stephanie and what's her last name?

A. McCrotchen.

Q. And who else?

A. Mandy.

Q. Mandy and what's her last name?

A. Jones and Carey.

Q. Carey?

A. Yeah, they're both sisters.

Q. Carey Jones?

A. Yeah.

Q. And she got the spider bites too, huh?

A. Yes.

Q. And who else?

[1-117] A. That's mostly all the kids I can think of.

Q. But you say all of them there got them, is that right?

A. Um-hum, yeah.

Q. Did you see the other kids getting these bites?

A. Yes.

Q. Where were they when they got the bites?

A. The same place I was, outside on the playground.

Q. Where were the teacher's [sic]?

A. Outside on the playground.

Q. So when you got these spider bites and the other children got the spider bites, the teacher's [sic] were there too, is that right?

A. Yes.

Q. And the teacher's [sic] saw this too, is that right?

A. Yes.

Q. What are some of the names of the teacher's [sic] that were there?

A. Miss Elise.

Q. Miss Elise.

A. Miss Caroline.

Q. Miss Caroline, and who else?

A. Miss Tessie.

Q. Miss Tessie, and who else?

A. That's all I can think of.

Q. Okay. So that we understand what we're talking [1-118] about, you say that the other children that were there also got the spider bites?

A. Yes.

Q. Okay and that this was on the playground?

A. Yes.

Q. And that the—when they got the spider bites, the same as you did, the teacher's [sic] that you named were there and they saw this and that was Miss Elise, Miss Caroline and Miss Tessie, is that right?

A. Yes.

Q. Now, talking about the opossum. What does an opossum look like?

A. Well, he has a tail.

Q. He has a tail.

A. He has ears.

Q. Um-hum.

A. He has a body, he has eyes and I'm not really sure if he has a nose. He has legs. I'm not sure if he has (inaudible).

Q. Okay. Now explain again what happened to the opossum?

A. She made him dizzy.

Q. He was in a can?

A. A trash can.

Q. And where was this trash can, on the playground?

[1-119] A. Yes.

Q. And who else was playing on the playground, the same kids?

A. Some of them could have been absent.

Q. Well, can you remember who was there?

A. I know everybody was there that time.

Q. And with the opossum, all the children you named before with the spiders were there with the opossum?

MS. O'DONNELL: Objection.

A. Yeah, yes.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. And were the same teacher's [sic] there?

A. Yes.

Q. Now, did you ever go camping with your daddy?

A. Yes.

Q. In the woods?

A. Yes.

Q. Did anyone touch you in your privates then?

A. No.

Q. How often did you go camping in the woods with your daddy?

A. Well, every summer, almost every summer.

Q. Would your mom go or just you and your dad?

A. Me and my dad mostly.

[1-120] Q. Now, you like to play games don't you Brooke?

A. Yes.

Q. You like to play mother. Is that the game you like to play?

A. Yes.

Q. And you like to be the mother, right?

A. Yes.

Q. Huh?

A. Yes.

Q. But Mrs. Craig, she wanted to be the mother some time, is that right?

A. Right.

Q. And you got mad because you wanted to be the mother, right?

A. Yes.

Q. Huh?

A. Yes.

Q. Do you still play mother?

A. Yes. I play mother with the kids.

Q. Do you. Are you the mother now where you go to school?

A. Yes.

Q. What does the mother do?

A. Well she plays and she works and she cooks.

Q. She works and she cocks.

[1-121] A. And she plays.

Q. Do you like to make believe?

A. Yes.

Q. Do you put on high heals [sic] and long dresses?

A. Yes.

Q. And what do you make believe, that you're the mommy of all the children, right?

A. Yes.

Q. What other games do you play make believe?

A. Well, I make believe all sorts of things.

Q. (Inaudible), that's a good game. Tell me what games.

A. I play airplane.

Q. Play what?

A. Airplane.

Q. What's that?

A. Well, it's where I get on my bed and pretend like I'm the airplane person and all my stuffed animals line up and I play with them.

Q. You get on what?

A. My bed.

Q. Uh-huh and you make out the bed's the airplane?

A. Yes.

Q. And you're the pilot, huh?

A. Yeah, and my kids are the passengers.

[1-122] Q. Oh, do you talk to the dolls?

A. Yeah.

Q. Do they talk back to you?

A. Yeah,

Q. Uh-huh, your dolls talk to you. What do you say to the dolls?

A. Well I say, hook your seat belts and we're ready to take off, okay.

Q. Uh-huh.

A. And that's mostly what I say to them.

Q. And what do the dolls say to you?

A. They say okay.

Q. They say okay, that's cute.

A. Yeah.

Q. What other game do you play like airplane? That's a good game?

A. I play make believe (inaudible).

Q. Okay, what's make believe? That sounds like a good game.

A. Well make believe is something that you pretend like you—well, you can do a lot of things by make believe (inaudible)

Q. Did you make believe that things are happening that aren't really happening, is that what you mean?

A. Yeah

Q. Uh-huh. Give me an example.

[1-123] A. Well, I sort of like play hide and go seek except it's not real.

Q. You like to make believe and then it feels like the things are happening but they're really not happening, right?

A. Yeah.

Q. Uh-huh and what do you do, tell yourself that they're happening?

A. Yeah.

Q. Do you talk aloud to your dolls and to your toys when you make believe?

A. Yeah, yeah.

Q. And do these toys and dolls answer you?

A. Yeah.

Q. And they make believe too, right?

A. Yes. Everybody makes believe at our house.

Q. Really?

A. Yeah.

Q. Your mommy and daddy too?

A. Our house—yeah, I call it the make believe house.

Q. Really. Well, why do you call it the make believe house?

A. Because we like to make believe sometimes.

Q. Give me an example what your mommy and daddy [1-124] make believe?

A. Well sometimes they make believe we're drawing when we really aren't drawing. Make believe all sorts of things.

Q. So you all get together and make believe something has happened when it really didn't happen, is that what you mean?

A. Yeah.

Q. And you even call it the make believe house, is that what you call it?

A. Yeah.

Q. Does your mommy call it the make believe house too?

A. No. She just calls it a regular house.

Q. But you call it a make believe house?

A. Yeah.

Q. Because you're all getting together and make believe things happen that didn't really happen, right?

A. Yes.

Q. Do you do that often?

A. Yeah. I do it a lot of times.

MR. KOLODNER: I have no further questions.

MS. O'DDONNELL: Brooke, I have a few more questions to ask.

THE WITNESS: And then are we going to be done?

[1-125] MS. O'DONNELL: Yes.

THE WITNESS: Thank you.

MS. O'DONNELL: Listen very carefully.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. We've talked a lot and Mr. Kolodner asked you questions about a lady named Mary Burke?

A. Yes.

Q. Where does Mary Burke work?

A. She works at the—oh, what is it called again. Oh, I forgot what it's called. Oh she works somewhere near Wendy's or the Pizza Hut. That's all I can give as (inaudible)

Q. And what is her job?

A. Well her job is to help people.

Q. How does she help you?

A. Well she talks to me.

Q. Brooke, do you know the difference between pretend and for real?

A. Yes.

Q. Are we pretending here or is this for real?

A. This is for real.

Q. We talked a lot about some bad things that happened at Mrs. Craig's School. Were those pretend or were they real?

[1-126] A. Real.

Q. What is the most important thing anyone remembers when they've got to go to court?

A. To tell the truth.

Q. Have you told the truth about everything about Mrs. Craig?

A. Yes.

Q. Have you told any lies about Mrs. Craig?

A. No.

Q. Has anyone told you to say any lies about Mrs. Craig?

A. No.

Q. Has your mom told you to tell lies about Mrs. Craig?

A. No.

Q. Has your dad told you to tell lies about Mrs. Craig?

A. No.

Q. Has Miss Mary Burke told you to tell any lies about Mrs. Craig?

A. No.

Q. Have I told you to tell any lies about Mrs. Craig?

A. No.

Q. How important is it to tell the truth when you [1-127] go to court?

A. Very important.

Q. Is it more important than pretend or is pretend more important?

A. It's more important than pretend.

Q. Are you telling things about what happened at Mrs. Craig's School because they really happened or are you telling things because someone told you to tell them and they're not true?

A. They're true.

Q. How did your mommy find out about all of the things that happened at Mrs. Craig's?

A. I told her.

Q. How did your daddy find out about all of the things that——

A. I told him.

Q. What did they tell you to say in court today?

A. Nothing. They just said to try my best.

Q. What did I tell you about coming to court today to tell?

A. The truth.

MS. O'DONNELL: No further questions.

RECROSS-EXAMINATION

BY MR. KOLODNER:

Q. What was the name of your girlfriend that you [1-128] said broke the tape?

MS. O'DONNELL: Objection.

A. Natalie.

(Sound pulled on video)

THE COURT: It's harmless. I agree it's not covered by redirect, but I'll overrule the objection.

Q. When you told a lie about Natalie you said at that time you were telling the truth to your mother, didn't you?

A. Yes.

Q. But you were really telling a lie?

A. Yes.

Q. So sometimes you say you're telling the truth when in fact it's a fib or a lie, right?

A. Right.

Q. And sometimes you make believe as to the truth when it's not really the truth, isn't that correct?

A. Yes.

MR. KOLODNER: I have no further questions.

MS. O'DONNELL: No further questions.

THE COURT: Would counsel approach the bench please.

MS. O'DONNELL: Brooke wait here until we come back (inaudible).

(Counsel approach the bench and the following [1-129] ensued)

THE COURT: All right, just wait until we conclude, no. Leave them on. Just leave it the way it is for the time being. Is Mr. Kolodner coming around.

Counsel, obviously we've concluded with this witness. I'm going to excuse her. Has she been summoned by both parties or is she subject to being recalled. Do you really want me to instruct her not to discuss her testimony with anyone. Do you think she's—is there a request that I——

MR. KOLODNER: No, I don't think so.

THE COURT: Okay.

MR. KOLODNER: At this point because it's a little peculiar situation I think we ought to have these marked.

THE COURT: The witness was shown certain documents that were identified—is it any question.

MS. O'DONNELL: No Your Honor. Again, I agree with Mr. Kolodner as to the order. This is the first photograph that she was shown.

THE COURT: Do you want it marked as defendant's one.

MR. KOLODNER: Yes that would be——

THE COURT: Defendant's—no they're not part of the trial. They came in as part of the motion.

MR. KOLODNER: All right.

THE COURT: Defendant's one for identification.

[1-130] (Defendant's exhibit number one marked for identification)

MS. O'DONNELL: The second photograph shown to Brooke Etze by the defense was this photograph, Your Honor, being a school picture from the year 1984-1985.

THE COURT: And that can be marked as defendant's two for identification.

(Defendant's exhibit number two marked for identification)

MS. O'DONNELL: The State agrees with the photograph being shown by Mr. Kolodner and asks that it be marked as an exhibit, number three being (inaudible) photographs looked at and testified to by Brooke Etze dated August 5, 1986. I would indicate for the record that is the same photograph in which the defendant, Sandra Craig, was identified by the witness.

THE COURT: All right, defendant's three has been marked for identification at this juncture. Is that—they're not offered into evidence by the defendant at this time.

(Defendant's exhibit number three marked for identification)

THE COURT: Okay. I would propose to instruct the bailiff that you may, in the jury's presence, release this witness. You have another witness lined up or something.

[1-131] MS. O'DONNELL: Yes Your Honor.

THE COURT: We'll take a five minute break.

MS. O'DONNELL: (inaudible) I'd like a break as well Your Honor.

THE COURT: Okay, thank you.

(Counsel return to trial tables and the following ensued)

THE COURT: Ladies and gentlemen, I'm going to excuse this witness who just testified. I'm going—we're going to take about a ten minute recess. Perhaps you can return to the jury room. We'll reconvene shortly. We'll recess briefly.

THE CLERK: Stand please.

(Brief recess)

THE COURT: All right, have a seat please. Will counsel just briefly approach the bench. Deputy perhaps you could come over—or Officer. What's your rank.

THE SHERIFF: Lieutenant.

THE COURT: All right Lieutenant. Excuse me sir.

(Counsel approach the bench and the following ensued)

THE COURT: Just for scheduling purposes Lieutenant, counsel tell me that they think it unlikely that they will interview another child in chambers through the rest of [1-132] this week, or perhaps Friday or——

MS. O'DONNELL: Sometime this week depending on progress.

THE COURT: So if you—certainly leave all the cables and all that stuff, you know, but if you want to take your camera's [sic] or safeguard them, you probably won't be needed.

THE SHERIFF: Is it okay to leave the wiring down.

THE COURT: Oh yes, leave the wiring and all that. As far as I'm concerned you can leave all this stuff here and everything. You can leave the wiring in chambers. Just do——

MR. WARFIELD: I think at this point the tape should be marked as an exhibit and placed into evidence, into the court file.

MS. O'DONNELL: We would ask it be marked as a State's exhibit Your Honor.

MR. WARFIELD: Mark it as a State's exhibit.

THE COURT: Do you have the ability to take that tape as it exists now. Does it have to be rewound?

THE SHERIFF: Well it should be rewound, you shouldn't stop a tape in the middle or near the end.

THE COURT: What would you propose to do. Have a separate tape for each child.

[1-133] MS. O'DONNELL: I would propose we have at least a separate tape as it relates to the alleged victim and witness Brooke Etze. Now, from the children who would be witnesses only for the purposes of other crimes of common scheme I would specifically delineate a tape.

THE COURT: Do you have the ability to take the tape out of that——

THE SHERIFF: Yes. I can replace it anytime, put a new one in and start over.

THE COURT: Well can you not physically retract that tape as it exists now and just introduce it into evidence.

THE SHERIFF: Yes. Yes sir.

MR. WARFIELD: Could you note the length of the tape at the time so that it's very clear that the—in other words that——

THE SHERIFF: You mean the running time?

MR. WARFIELD: Yeah, the running time.

THE COURT: Can you go in and get it now. I mean, how much does—do you have to rewind it.

THE SHERIFF: It will only take a minute.

THE COURT: Why don't you do that now and we'll receive it in evidence and then everybody understands what's on the tape. Would that be acceptable.

MS. O'DONNELL: It is to the State.

[1-134] MR. KOLODNER: Yes sir. I would like to make some motions this afternoon.

THE COURT: Sure.

(Counsel return to trial tables and the following ensued)

THE COURT: As soon as the technician retrieves the tape, counsel, we'll reconvene. It's going to be an exhibit Mr. Clerk. Either——

(Technician leaves courtroom to retrieve video tape of Brooke Etze's testimony)

THE COURT: Approach the bench please.

(Counsel approach the bench and the following ensued)

THE COURT: Lieutenant Pruitt has the video tape, I take it——

THE SHERIFF: Yes sir.

THE COURT: —that was used in this courtroom. It's the exact video tape of the witness who testified and includes nothing other than what was exhibited in this courtroom, is that correct?

THE SHERIFF: Yes sir.

MR. WARFIELD: Does it include the Judge's questioning of——

THE SHERIFF: Yes sir.

THE COURT: Which was viewed also in this courtroom.

[1-135] MR. WARFIELD: Is there a delineation where that part stops and the examination begins?

THE SHERIFF: There's a pause there.

MR. WARFIELD: But I mean, can you tell the difference?

THE SHERIFF: Yes from the camera angle.

MR. WARFIELD: No, but I'm saying is there any marking on there where you can say where it ends?

THE SHERIFF: No. Only if it's used on the same VCR unit. It's difficult.

MR. WARFIELD: I'm anticipating the possibility that if it is an exhibit that it would be possibly used by the jury during jury deliberations.

THE COURT: Does counsel——

THE SHERIFF: I can run it back if you want.

THE COURT: No, no, no. Does counsel envision at anytime that this video tape would be viewed by the jury?

MR. WARFIELD: I only say that for this reason, Your Honor, I know in may other cases that there are requests from time to time from the jury. If there were requests—I mean, if it is an exhibit it would be possible.

THE COURT: Well perhaps the appropriate release, assuming the Court was of a mind to allow the jury to hear the testimony of that child, the Court could do so by way of [1-136] playing the recording.

MR. WARFIELD: Right.

MS. O'DONNELL: Would the Court prefer it be marked as a Court exhibit?

THE COURT: Well, I was going to suggest that unless there's some problem, unless somebody wants to be the author of it.

MS. O'DONNELL: No.

THE COURT: It would be my . . . it seems to me, unless somebody could convince me to the contrary that it should be part of the record in this case, not exhibited to the jury and it seems to me the Court should receive it as a Court exhibit as opposed as an exhibit——

MS. O'DONNELL: That's understood by the State, Your Honor.

MR. KOLODNER: And now—it's being introduced now as an exhibit.

THE COURT: Well I would receive it and be inclined to receive it subject to objection.

MR. KOLODNER: And this is the time I would like to object, the reasons being the procedure used, a closed video violating the constitutional rights of the defendant, the failure of the telephone at times to work and of the inability of the accused to be confronted by her accuser. For those reasons I object.

[1-137] THE COURT: It's my understand [sic] that on the one occasion that counsel brought to my attention the fact that he was unable to communicate with counsel in the—as Mr. Hirt brought to my attention his inability to communicate with Mr. Kolodner, I stopped the proceedings and is counsel proffering there was some interruption or some other inability.

MR. KOLODNER: That's the only time sir.

THE COURT: Fine, thank you. All right Mr. Clerk, it will be received over objection and will be marked as Court's exhibit number one. It is not to be exhibited to the jury unless I would instruct you otherwise.

THE SHERIFF: I want to add that I'm going to take the tab off here so it can't be tampered with.

THE COURT: Sure.

MS. O'DONNELL: And I would note that Lieutenant Pruitt is doing that in the presence of counsel and the Judge and the defendant.

THE COURT: To keep you from reediting it or taped over. This precludes you from taping over it or something. I know that from what my children tell me. All right. I'm going to have the jurors brought in. Do you have another witness lined up.

• • •

[Certificate of Court Reporter omitted in printing]

[5-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Case No. 15625

STATE OF MARYLAND
VS.
SANDRA A. CRAIG

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Trial on the Merits)
VOLUME V OF XII

Howard County, Maryland
Friday, March 20, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.
(and a jury)

APPEARANCES:

For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defendant:
F. Kolodner, Esquire
J. Hirt, Esquire

Janet Falkenstine-Court Reporter
Circuit Court for Howard County
8360 Court House Drive
Ellicott City, Maryland 21043

[5-18] • • •

THE COURT: I'm glad I didn't ask the Sheriff to do it. That's where he was heading. You have the child available within a few minutes to be brought over here, the first child?

MS. O'DONNELL: Yes Your Honor.

THE COURT: Do you have your colleague here this morning.

MR. KOLODNER: He's supposed to be here. He may have been delayed. I have instructed my client as to the telephone. She knows if anytime she wants to reach me via the telephone, that's where it is.

[5-19] THE COURT: Okay.

MR. KOLODNER: That she knows to stand up and address the Court if she cannot reach counsel at the time that it happens. He should be here any minute.

THE COURT: Fine.

MR. WARFIELD: We'll test it just to be absolutely sure.

THE COURT: You would propose to—and if she would wish to communicate with you by phone she would do what, I'm sorry.

MR. KOLODNER: She is supposed to pick up—as I under—I don't know, but I believe she's supposed to pick up the phone and just talk to me.

THE COURT: How is Mrs. Craig or co-counsel of Mr. Kolodner going to communicate with Mr. Kolodner in my chambers.

THE SHERIFF: By the phone. There's a two-way set up.

THE COURT: Okay, good.

(Sheriff explains communications hook-up)

THE COURT: We'll get by somehow.

MS. O'DONNELL: Your Honor (inaudible) communication with Mr. Kolodner is done by phone.

THE COURT: Okay. Well, why don't I excuse the jury and then we'll talk to the child in chambers.

[5-20] (Counsel and the defendant return to trial tables and the following ensued)

THE COURT: Good morning again ladies and gentlemen. Now that you're comfortable, we're going to ask you to return to the jury room for a brief period of time.

(Jury leaves courtroom)

MR. KOLODNER: If it please the Court, could the defendant be excused.

THE COURT: We'll take a brief recess before we commence the proceeding. Would counsel just approach the bench one more time.

(Counsel and the defendant approach the bench and the following ensued)

THE COURT: Just so I understand. First—and I don't know these children's names despite——

MS. O'DONNELL: The first child would be Drew Woodbury.

MR. KOLODNER: Actually I think it's Andrew.

MS. O'DONNELL: I'm not sure about that. It's Andrew but they call him Drew.

MR. KOLODNER: It's Andrew I believe, okay.

MS. O'DONNELL: His last name is——

MR. KOLODNER: Woodbury.

MS. O'DONNELL: W.o.o.d.b.u.r.y.

THE COURT: How old is the child?

[5-21] MS. O'DONNELL: I believe he's five.

THE COURT: That's good enough. All right, let me—before you bring the child in, you better wait for Mrs. Craig to return. Why don't you—we'll take a recess. When you're ready, let us know and then I'll see all of you in chambers. All right, let's recess for a moment.

MR. KOLODNER: I'll inform you when she comes in.

(Competency qualification of Drew Woodbury by the Court in chambers via video tape)

THE COURT: Can we proceed.

THE SHERIFF: As soon as I get this hooked up. We can proceed.

COMPETENCY QUALIFICATION

BY THE COURT:

Q. Good morning, how are you today?

A. Fine.

Q. Could you tell me your name?

A. Drew Woodbury.

Q. Drew, I'm Judge Kane, all right?

A. All right.

Q. I'm just going to ask you some questions and maybe when I finnish the two people behind us might ask you some questions in a little while. How old are you Drew?

A. Five.

Q. And where do you live, do you know the street [5-22] where you live on?

A. Far—Farmer's House Road.

Q. All right, and do you go to school?

A. Yes.

Q. Where do you go to school?

A. E.C.L.C.

Q. E.C.L.C.? Ellicott City, right, what's E.C.L.C., do you know? Well, that's all right.

A. It's a school.

Q. Okay, is it near your house?

A. Yes.

Q. All right. You can just sit back, you don't have to talk into the mike. You're doing a real good job, all right?

A. All right.

Q. It's just important that we hear you and if we can't hear you, this gentleman here with the camera will tell us that.

A. Okay.

Q. What grade are you in Drew, are you in Kindergarten?

A. Yes.

Q. All right and you live at home with your mother, your father, both? Who lives at home with you?

A. Um, both except my father lives far, far away.

Q. Okay. Do you have brothers and sisters?

[5-23] A. No.

Q. You're the only one?

A. No audible response.

Q. Okay. Do you know where you are today? Do you know what this building is here?

A. No audible response.

Q. I'm sorry, if you don't know that's all right. What are—who is your teacher this year in Kindergarten? Do you know her name?

A. Miss (inaudible) and Miss Patti.

Q. Miss Patti, okay, and what do they teach you in Kindergarten, what do you do in Kindergarten?

A. Learn and read.

Q. Read, can you read?

A. Um-hum, (inaudible) because we do math and super—we do math and language with superkids.

Q. Okay, what kind of math do you do? Do you mean with numbers?

A. Numbers, with numbers.

Q. Okay, do you know your numbers?

A. Yes.

Q. What numbers do you know? Can you tell me some numbers? Can you go from one to ten or——

A. I can go one to a hundred.

Q. Well, I don't want—why don't you start off until [5-24] I get tired of hearing you count. Just count for awhile. Count me one to ten.

A. One, two, three, four, five, six, seven, eight, nine, ten.

Q. Very good and do you know colors? Do you do painting and stuff like that, coloring in school?

A. No audible response.

Q. Yes? You have to tell me yes or no.

A. Um, yes.

Q. Okay, what color is this thing I'm wearing here?

A. Black.

Q. Right. How about this tie I'm wearing, do you know what color that is?

A. Dark red.

Q. Very good. Okay, how about this pad of paper here. What color is this paper?

A. Yellow.

Q. Okay. Do you know A.B.C.'s?

A. No audible response.

Q. Tell me some A.B.C.'s.

A. Sings, a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, x, y, and z. Now I know my a.b.c's, next time won't you sing with me.

Q. You don't really want me to sing with you do you?

A. No audible response.

[5-25] Q. They call you Drew? Is that your name, is it Andrew or is it Drew or——

A. Drew.

Q. Okay.

A. Not Andrew.

Q. I'm sorry, I didn't know that. Where did you go before you went to the E.C.L.C. kindergarten, Drew? Do you remember, did you go to school or pre-school?

A. I went to Children's World.

Q. Okay, how long—did you go to a school before you went to Children's World?

A. Mrs. Craig's.

Q. Okay. Do you remember when you went to Mrs. Craig's School?

A. Huh?

Q. Do you remember when you were going to Mrs. Craig's School?

A. No audible response.

Q. Yes? You have to say yes or no because what you say is—they have to—we have to know. You're shaking your head, yes, you do remember when you were at Mrs. Craig's School, is that right?

A. No audible response.

Q. Okay. Do you know what it means to tell the truth Drew?

[5-26] A. Yes.

Q. Do you know what it means to tell a lie?

A. Yes.

Q. What's—tell me what the difference is. Is it right or wrong to tell a lie?

A. Wrong.

Q. Okay. Do you know what a lie is?

A. Yes.

Q. If I told you that I was a lady, would I be telling you the truth or telling you a lie?

A. A lie.

Q. Why?

A. Because you're not a lady.

Q. Okay, and it would be wrong for me to tell a lie, is that right?

A. Yeah.

Q. Okay. If you told me that you were a school teacher who taught kindergarten, would that be the truth?

A. A lie.

Q. Why?

A. Because I'm not a teacher yet.

Q. Is it wrong to tell a lie?

A. Yes.

Q. Have you ever told a lie in the past, maybe at home or something like that?

[5-27] A. No.

Q. Okay. You know we're going to ask you some questions here today and you must tell us the truth, do you understand that?

A. No audible response.

Q. And when I finish, the two people behind you over there may ask you some questions, so you must tell them—you must promise me to tell the truth, do you understand that?

A. Yes.

Q. Do you know that it's wrong to tell, in court here today, a lie, do you understand that?

A. Yes.

Q. Okay. Do you know that you're in court here today. Do you know that this is a court house?

A. Yes.

Q. How did you come here today? Did somebody bring you here?

A. I rode in a car.

Q. All right, who drove the car?

A. No.

Q. No, I didn't say you did. I said who did? Do you remember who drove you here?

A. Yeah, my father.

Q. Okay. We're going to ask you some questions about [5-28] when you were at Mrs. Craig's school. Do you know—remember—you know that, do you not?

A. No audible response.

Q. Okay, and will you tell us the truth when we ask you those questions?

A. Yes.

Q. All right. Will you tell us what you remember?

A. Um-hum.

Q. All right. Has anybody told you what to tell me or these other people when we ask you questions?

A. Yes.

Q. Well, what did they tell you to tell me? Did they tell you what answers to tell to the questions?

A. Yes.

Q. What did they—what answers did they tell you to say?

A. Um, who's being mean.

Q. Did they tell you that they were going to ask you who was going to be mean?

A. Yes.

Q. And if you were asked who was being mean, do you know the answer to that question?

A. Yes.

Q. What's the answer?

A. No audible response.

[5-29] Q. You don't want to tell me right now, right?

A. Right.

Q. Well, are you going to answer these ques—are you going to tell me what other people told you to say or are you going to tell me what you remember?

A. Remember.

Q. All right. Well if we asked you a question and are you going to tell us what you remember happening?

A. No audible response.

Q. Yes?

A. Yes.

Q. Suppose somebody told you—if you want to answer a question and—is your answer to a question going to be what somebody told you to tell us or is it going to be what you remember happening?

A. Remember.

Q. Do you remember Miss—when you—you told me you remembered being at Mrs. Craig's School?

A. Yes.

Q. And you know it's important for you to tell me what you remember and not what other people told you to say, do you remember that?

A. Yes.

Q. All right. Did anybody tell you to tell me things that didn't happen?

[5-30] A. No.

Q. And you understand you must tell me the truth, do you understand that?

A. Yes.

Q. And you must tell these other people the truth when they ask you questions?

A. Yes.

Q. And you must tell us what you remember and not what other people told you to say?

A. Yeah.

Q. All right and you're telling me that nobody told you to tell me anything that wasn't true? Did anybody tell you to tell me a lie?

A. No.

Q. Did—who told—when you talked to someone about what was going to—you talked to somebody about the questions that we were going to ask today?

A. No audible response.

Q. Yes?

A. Yes.

Q. Who did you talk to about this?

A. My mother.

Q. Did your mother tell you some of the questions that you would be asked by me and the other people?

A. Yeah.

[5-31] Q. All right. Did she tell you to tell us a lie?

A. No.

Q. Did she tell you to tell us the truth?

A. Yes.

Q. Did she tell you how to answer the questions, tell you the words to say?

A. Yes.

Q. Did she tell you to answer anything or to say anything that wasn't true?

A. No.

Q. That was a lie?

A. Yeah.

Q. Did she tell us—tell you to tell me anything that was a lie?

A. Un-un.

Q. No?

A. No audible response.

Q. And the things that your mother told—was talking about and told you that we were going to ask questions about, do you remember those things?

A. Yes.

Q. All right. Even if someone hadn't told you about them, would you remember them?

A. Yes.

THE COURT: Okay, I'm going to step outside in a [5-32] few minutes and maybe these other people will be back. You can just sit here for a few minutes, okay.

THE WITNESS: Okay.

THE COURT: Just for the record, when this proceeding's going on the only people present in the room is Drew and counsel for the State and the Defendant and myself and the technician who's operating the video camera. I'm going to step outside for a few minutes, okay.

THE WITNESS: Okay.

THE COURT: You can remain there, see you in a little while, okay?

THE WITNESS: Okay.

(Court and counsel leave chambers and go back into the courtroom)

THE CLERK: Stand please.

THE COURT: Have a seat please. Is the sound off Madam Reporter?

THE REPORTER: Yes Your Honor.

THE COURT: Would counsel like to be heard concerning the appropriateness of me hearing from this witness as a competent witness?

MR. KOLODNER: More as to what was (inaudible)—(Unable to hear Mr. Kolodner due to background noise).

THE COURT: Do you want to respond?

MS. O'DONNELL: Your Honor, the State's only response is that it is the State's position that the Judge's, [5-33] your, questioning of the child Drew Woodbury regarding competency was thorough and complete. I believe the Court in its questioning and the answers that Drew gave made it more than clear that Drew knew that he was in court today, to tell the truth and Drew knew that his testimony was to be based on his rememberance and not anything he was told about.

THE COURT: Well, I would decline to question the child further. I've had, as far as I'm concerned, a sufficient opportunity to consider what the child told me to let me decide the issue of competency, but I'll be glad to hear from counsel as to whether they think it's appropriate. I would assume from what Mr. Kolodner is saying that in

the absence of further questioning that—I don't know what that's all about—that in the absence of further questioning—it's the recorder from—they're being buzzed I guess by somebody inside. I'm satisfied I've had sufficient opportunity to garner the facts to assist me in making this decision, but would you want to be heard as to that issue Mr. Kolodner. That is, the appropriateness of me ruling this child to be competent or not.

MR. KOLODNER: Unable to hear.

THE COURT: Sheriff, tell the people to sit down and keep quiet please. Pardon me sir.

Mr. Kolodner: Just to that issue of what—who [5-34] talked to him, what she said (inaudible). I think this should be explored, the amount of time, how many times he was told, the wording of what he was told. The wording—the answers that he was told would be hearsay.

THE COURT: Well, I don't think that goes to the issue of competency, it may go to whatever weight the Court wants to give to it. I'm satisfied, let me say this, that based upon, and over the objection of the defendant, that based upon my questioning of this child, that this child has—does have the ability to communicate with us. That is to understand questions that we are—that I have asked him and that we will ask him and to frame and to articulate and express intelligent answers. I'm further satisfied that the child has a recollection of the incidents with which he is going to testify. That is, the child told me that he does remember Craig's School and he understands that that's the subject matter of his discussion. That he has an independent recollection of that and that although he's been told and given some idea, apparentiy, or told questions that are going to be asked of him today apparently by his mother, that he's going to tell us what he remembers and not what his mother told us to tell him. He's going to tell us the truth. So I'm satisfied that the

child had the capacity to observe and to remember the matters about which he's going to testify and I'm further satisfied that the child does have [5-35] an awareness of his obligation to speak the truth. So I'm satisfied that the child is a competent witness and over the objection of counsel will permit the child to testify.

MS. O'DONNELL: The Sheriff indicates that the room—he believes the room is set up perfectly for the examination.

THE COURT: Okay, well then let's proceed. Mr. Clerk, would you go in—Mr. Clerk—excuse me gentlemen.

(Court speaks to the Clerk)

THE COURT: Counsel, one more thing before you go. Sheriff—never mind the Sheriff's not here. Just instruct the technician any objection pull the plug, then tell me what your objection is and I'll speak to you.

MS. O'DONNELL: I understand.

THE COURT: I guess we better ask the jurors in. Somebody go get the jurors.

(Jury enters courtroom)

(Video tape examination of Drew Woodbury)

BY MS. O'DONNELL:

Q. Okay, Drew, you know me right, I'm Kate O'Donnell. I'm going to be asking you some questions and remember it's very, very important that you answer with the truth, the whole trust and nothing but the truth, right?

A. Right.

Q. Okay, I'm going to ask you first what is—oops, [5-36] excuse me. This man is going to tell you to promise to tell the truth, all right.

A. Okay.

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, what is your whole name?

A. Drew Patton Woodbury.

Q. And how old are you?

A. Five.

Q. And what is your birthday, do you know? What month is your birthday?

A. August the 22nd.

Q. And do you go to school now?

A. Yes.

Q. And where do you go to school?

A. E.C.L.C.

Q. Does that stand for Ellicott City Learning Center?

A. Yes.

Q. And what grade are you in at E.C.L.C.?

A. Kindergarten.

Q. Did you know that you're in a courtroom today, in the Judge's office in a courtroom—in a court house?

A. Yes.

Q. And you know that you have to promise to tell the [5-37] truth, the whole truth and nothing but the truth to the Judge?

A. Yes.

Q. And do you know the difference between telling a lie and telling the truth?

A. Yes.

Q. And do you know you get in big trouble if you tell a lie when you go into the court house?

A. Yes.

Q. Where did you go to school before you went to school at E.C.L.C.?

A. Children's World.

Q. And where did you go to school before you went to Children's World?

A. Mrs. Craig's.

Q. Was Mrs. Craig's school a nice school or a mean school?

A. Mean school.

Q. When you were at that school did you know Mrs. Craig?

A. Yes.

Q. Was she a nice lady or was she a mean lady?

A. Mean.

Q. Did Mrs. Craig ever do anything to you that was mean?

[5-38] A. Yes.

Q. And what did she do?

A. Put something cold in my behinney.

Q. Put something cold in your behinney? Where is your behinney, would you just point to where it is?

(Witness indicates)

Q. Is it back there?

A. Yeah.

Q. Where were you in Mrs. Craig's school when Mrs. Craig put something cold in your behinney?

A. In her office.

Q. How did that make you feel inside when she did that to you?

A. Sad.

Q. Was there anybody in that office besides you and Mrs. Craig?

A. No.

MS. O'DONNEL: Mr. Kolodner, witness with you.

Q. Drew, this man, Mr. Kolodner's going to ask you some questions now, okay?

A. Okay.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Drew, where did you say you live?

A. Columbia, Maryland.

[5-39] Q. Do you know the address?

A. No audible response.

Q. That's hard, huh. You can't remember that one can you?

A. Un-un.

Q. Do you play sports at school?

A. Yes.

Q. I bet you're good?

A. I'm good.

Q. What do you play? Do you play ball?

A. Yep.

Q. Are you a pitcher?

A. Yeah, we play baseball and tennis.

Q. Do you play tennis?

A. And soccer.

Q. Oh boy. What are you best at?

A. All three.

Q. You're really good at all three huh, baseball, tennis and soccer, wow.

A. Because I get it right—because I get—because I get the ball right into the net everytime.

Q. You mean when you kick it?

A. Yeah and they'll be kicking it into my net, because I'm—because they kick so hard that I kick even harder than them I just kick it right over the "bam" it gets it [5-40] right—right the gate.

Q. Do you get it past the goalie? Do you have a goalie that plays in our——

A. Yeah, I get it right past the goalie because the goalie is—I'm one of the players.

Q. You're too fast for the goalie, huh?

A. Yeah, yeah, it goes right over the goalie and right into the net.

Q. You play that everyday?

A. Uh-huh.

Q. That's a lot of fun, huh?

A. The bad guys never win.

Q. The bad guys never win, only the good guys, right?

A. Right.

Q. And I think you're one of the good guys?

A. Yes I am one of the good guys.

Q. I could tell that just as soon as I saw you. You look like a good guy. I saw you before looking—the Clerk had a little toy.

A. Whoa.

Q. Wow, you like that huh?

A. No audible response.

Q. Do you believe in Superman?

A. Yes.

Q. Am I Superman?

[5-41] A. No.

Q. If I gave you this toy would you say I was Superman?

A. No.

Q. Okay. You're such a nice fellow, I'm going to give you this toy anyway. It's the one you like, isn't it. I was going to give it to Kate O'Donnell, but I'm going to give it to you. Here you are.

A. (laughter).

MS. O'DONNELL: Drew, would you put it down on the floor until we get finished talking.

BY MR. KOLODNER:

Q. Who brought you here today? Should I call you Andy or Drew?

A. My father and my mother.

Q. They both brought you here?

A. Yeah.

Q. I thought your daddy lived far away?

A. I know, except he came over to my mother's and he—and both of them drived me over here.

Q. Did—have you ever been in this room before?

A. Yes.

Q. How many times have you been in this room before?

A. Three, cause this is my third time?

Q. Really.

[5-42] A. Because the first I had—I was in here two times and this was my third one.

Q. Who brought you here?

A. My father and my mother.

Q. Well, did they tell you you'd have to say some things in this room?

A. Yes.

Q. And who—did anyone else bring you here?

A. No.

Q. And this is—you've been here three times?

A. Yep.

Q. Your mommy told you that you were coming here today, didn't she?

A. (giggles).

Q. You knew all about that, didn't you?

A. No audible response.

Q. And she told you—did she tell you I was going to be here?

A. No audible response.

Q. She did?

A. No audible response.

Q. Did she tell you I was mean or good?

A. Good.

Q. Good. Now did your mommy tell you some of the questions that were going to be asked of you today?

[5-43] A. Yes.

Q. And how many times did she tell you the questions?

A. One.

Q. Well, do you remember any of the questions she told you you were going to be asked?

A. No.

Q. Did she tell you that you were going to be asked about Mrs. Craig?

A. Yes.

Q. All right. Did she tell you that you were going to be asked all about the Craig School?

A. Um, yes.

Q. And did she tell you that Mrs. Craig was mean?

A. Yes.

Q. And did she tell you that Mrs. Craig did bad things?

A. Yes.

Q. And did she tell you that Mrs. Craig did bad things to you?

A. Yes.

Q. How many times did your mommy tell you that?

A. One.

Q. Was that driving over here?

A. No, while I was at home.

Q. Oh, while you were at home. Okay, on the other times that you came to this room, did your mommy tell you the [5-44] same things that Mrs. Craig was mean?

A. Yeah.

Q. And that's when you were in this room before?

A. Yes.

Q. And did your mommy tell you that the Craig School was bad?

A. Yes.

Q. And that bad things happen at the Craig School?

A. Yes.

Q. Now, your mommy told you that?

A. Um-hum.

Q. And that was when you were in this room before, is that right?

A. Yes.

Q. And do you remember how long ago it was when you were in this room?

A. No.

Q. So your mommy told you when you were in this room that Mrs. Craig was bad, right?

A. Right.

Q. And that she did bad things?

A. Yes.

Q. And the Craig School was bad?

A. Yes.

Q. And then she told you again this morning the same [5-45] thing, is that right?

A. Yeah.

Q. Did your daddy tell you the same things?

A. No.

Q. Just your mommy?

A. Yes. He didn't say anything.

Q. So it was just your mommy who told you these things, is that right?

A. Yes.

Q. Did anyone else ever tell you those things?

A. No.

Q. Now, do you remember how long ago you went to the Craig's School? Do you remember when it was?

A. No.

Q. Do you remember—you told—what do you call this lady, Miss O'Donnell or Kate?

A. Kate O'Donnell.

Q. Kate O'Donnell, you told Kate O'Donnell a little while ago that Mrs. Craig put something in your hinney, is that correct?

A. Yes.

Q. Do you know when that happened?

A. After snacktime.

Q. Is that one of the questions your mommy told you was going to be asked of you?

[5-46] A. Yes.

Q. And did your mommy say that Mrs. Craig put something in your hinney?

A. Yes.

Q. Was that this morning that she said that?

A. Yes.

Q. And did she also tell you that on the day that you were in this room before?

A. Yes.

Q. When Mrs. Craig put something in your hinney, did you tell your mommy?

A. Yes.

Q. When did you tell her?

A. The minute before we left.

Q. I don't understand your—Drew, the minute you left where, the school?

A. Home.

Q. I'm talking about on the day that you say Mrs. Craig put something in your hinney, did you tell your mommy that day after school?

MS. O'DONNELL: Objection.

A. Yes.

(sound pulled on video tape)

THE COURT: I'll overrule the objection.

Q. So it was that same day you told your mommy, right?

[5-47] Q. Sometimes little boys don't always tell the truth, do they?

A. No.

Q. And sometimes little boys get punished when they don't tell the truth, isn't that right?

A. Yes.

Q. When you don't tell the truth what does your mommy do to you?

A. No audible response.

Q. Do you forget?

A. No audible response.

Q. All right. Well sometimes you don't tell the truth, isn't that right Drew?

A. No audible response.

Q. Now, you're shaking your head yes, is that right?

A. No audible response.

Q. When don't you tell the truth Drew?

A. No audible response.

Q. You don't like to talk about when you don't tell the truth, do you?

MS. O'DONNELL: Objection, ask to strike.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You can continue.

Q. When's the last time you didn't tell the truth Drew?

A. When I left mrs. [sic] Craig's to go to Children's World.

[5-48] Q. You told a little fib then?

A. Yes.

Q. You know what a fib is, like a lie, huh?

A. Yeah.

Q. Yeah. What lie did you tell then when you left Mrs. Craig's?

A. I'm a girl.

Q. You told someone you were a girl?

A. No audible response.

Q. Have you told some fibs about Mrs. Craig's school?

A. Yes.

Q. When did you tell some fibs about Mrs. Craig's school?

A. At lunchtime.

Q. When today?

A. No audible response.

Q. It's not lunchtime yet, you mean on another day?

A. Yeah on another day when I was at Mrs. Craig's at lunchtime.

Q. Now what lie did you tell?

A. I'm a brick.

Q. Sometimes you imagine that you're other things right?

A. Yes.

[5-49] Q. Sometimes you say you're a brick and sometimes you say you're a girl and——

MS. O'DONNELL: Objection, ask to approach the bench)

(Sound pulled on video tape)

(Counsel leave chambers and approach the bench with the defendant in the courtroom)

MS. O'DONNELL: Your Honor, first I'd ask that at the very least the Court allow me to remove the toy which is obviously distracting Drew from——

THE COURT: That's not apparent to me by the way.

MS. O'DONNELL: There's a toy at the foot—to the left of the chair that the child is reaching down, looking off camera, touching, rolling back and forth. I'd ask that he be given——

THE COURT: I would suggest that Mr. Kolodner just tell the child that I'm going to put the toy in the next room until the case is over, until we're finished or something like that.

MR. KOLODNER: All right, Your Honor.

THE COURT: It's not apparent—I can see the kid playing with the truck now, but it's not apparent on the screen that he was——

MS. O'DONNELL: During the last course of at least [5-50] the past five questions from Mr. Kolodner he was learning to—out of the left side of his chair into the left arm——

THE COURT: Fine.

MS. O'DONNELL: —playing with the toy. It's distracting him.

THE COURT: All right. I would suggest that you, Mr. Kolodner, since you gave him the toy just say, I'm going to take the toy and put it over here until we're finished, okay.

(Counsel leave the courtroom and return to chambers where the questioning of Drew Woodbury continues)

MS. O'DONNELL: May the record reflect that counsel is back in the room after a bench conference.

BY MR. KOLODNER:

Q. Drew, I'm going to have to ask you some questions. Let me just hold the toy and I'll put it down and I promise that I will give it to you after—no, no, let me put it over here. I'll promise I'll give it to you when you leave, okay. This is your toy and you'll get it when you leave, okay, okay?

A. No audible response.

MS. O'DONNELL: Just sit in the chair and listen carefully.

A. I don't know that—we can put these in the back.

Q. Right.

[5-51] A. I didn't throw some legos in the back in case—in case I want—I want—I want—I want that truck to give me some legos. I could just bring them and put legos in them and then make——

Q. What's a lego?

A. Oh, legos are something—is something that you stack on and make something——

Q. What do you make out of legos?

A. A lot of things in my toy or just roll out and give me legos.

Q. Well before you said that sometimes you say that you're a brick, is that right?

A. No audible response.

Q. You're shaking your head yes, is that right?

A. Yeah.

Q. Qnd [sic] sometimes you say that you're a girl, is that right?

A. Yes.

Q. And what else do you say that you are?

A. A house.

Q. Sometimes you imagine you're a house.

A. A telephone, a pencil and a light bulb.

Q. When do you imagine that you're a pencil and a light bulb?

A. Everyday.

[5-52] Q. When do you think that you're a telephone?

A. Everyday.

Q. And when do you think you're a house?

A. Everyday.

Q. Do you tell other people that?

A. No.

Q. You just imagine it in your mind, hum?

A. Yes.

Q. Do you imagine that you're anything else?

A. No.

Q. Did you ever tell your mommy that you thought sometimes that you're a brick or you're a house or a telephone?

A. No.

Q. Did you ever tell her that you were a girl?

A. No.

Q. Do you lie about anything else?

A. No.

Q. Now do you lie about Craig's sometimes?

A. No.

Q. Did you have fun in the hot tub at Craig's with your daddy, hum?

A. Yes.

Q. What's a hot tub?

A. I don't know.

Q. Do you remember the hot tub?

[5-53] A. No.

Q. What fun things did you do at Craig's?

A. None.

Q. Is that one of the questions your mommy told you this morning?

A. Yes.

Q. Your mommy doesn't like Craig's, does she?

A. No.

Q. She told you that didn't she? She told you that didn't she Drew?

A. Yes.

Q. When Mrs. Craig put something in your hinney you said that night you told your mommy, is that right?

A. Yes.

Q. Did you go to school the next day?

A. Yes.

Q. Did you ever tell anyone else that Mrs. Craig put something in your hinney?

A. No.

Q. Just your mommy?

A. Yes.

MR. KOLODNER: I have no further questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, I have a few more questions.

[5-54] A. Okay.

Q. I want you to listen carefully and I want you to remember the promise to tell the truth, the whole truth and nothing but the truth, okay?

A. Okay.

Q. Are you really a girl?

A. No.

Q. Are you really a brick?

A. No.

Q. Is that a pretend thing to say or a real thing to say?

A. A pretend thing to say.

Q. Are you really a house?

A. No.

Q. Are you really a telephone?

A. No.

Q. Are you really a pencil and a light bulb?

A. No.

Q. Your mommy wasn't there when Mrs. Craig stuck something cold up your hinney, was she? She wasn't in the room, was she?

A. No.

Q. How did she find out about it?

A. When she felt it.

Q. How did your mommy find out about it?

[5-55] A. When she feeled the cold.

Q. Did she look at your hinney hole to see if it was okay?

A. Yes.

Q. And the Mrs. Craig (inaudible) was the truth wasn't it? What you told about Mrs. Craig was the truth, wasn't it?

MR. KOLODNER: Objection.

A. Right.

(sound pulled on video)

THE COURT: I'm going to overrule the objection. Again, it's a child. Some degree of leading questions are appropriate. You can ask the child if what he is telling you really happened, etcetera.

BY MS. O'DONNELL:

Q. Did that—or when Mrs. Craig put something cold up your hinney, did that really happen?

A. Yes.

Q. Did you promise to tell the truth about that when you came to court today?

A. Yes.

Q. Did your mommy tell you to tell the truth today?

A. Yes.

Q. Who else told you to tell the truth today?

A. Daddy.

[5-56] Q. Did you tell the truth when you were talking about Mrs. Craig?

A. Yes.

MS. O'DONNELL: No further questions.

RECROSS-EXAMINATION

MR. KOLODNER:

Q. Drew, what did you mean when mommy felt to see if it was cold?

A. No audible response.

Q. Did your mommy put her hand or something in your hinney?

MS. O'DONNELL: Objection.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You may proceed.

Q. She put her foot in your hinney?

A. Uh-huh.

Q. When was this?

A. The day—a day when Mrs. Craig put something cold in my behineey.

Q. Let me ask—and that night you told her that Mrs. Craig had put sor thing in your hinney and then your mommy put her foot in your hinney?

A. No sudible [sic] response.

Q. Had your mommy ever put her foot in your hinney [5-57] before?

A. No audible response.

Q. She had and how often had she done that, a lot of times?

A. No audible response.

Q. Five? Five times?

A. Yes.

Q. Had anyone else at your house put something in your hinney?

MS. O'DONNELL: Objection.

A. No.

THE COURT: I'll overrule the objection.

Q. Just your mommy had put something in your hinney, is that right?

A. No, just Mrs. Craig.

Q. But your mommy five times put her foot in your hinney, is that what you're saying?

A. Yes.

Q. Did it hurt you when she put her foot in your hinney—her foot in your hinney?

A. No.

MR. KOLODNER: I have no other questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, are you getting tired of answering questions?

[5-58] A. Yes.

Q. Are you getting silly?

A. No audible response.

MS. O'DONNELL: No further questions.

MR. KOLODNER: I guess it will be okay for the toy.

(End of video tape testimony by Drew Woodbury)

(Counsel enter the courtroom)

THE COURT: Counsel, I would, since the examination of the witness is concluded I would propose to turn the video's off. Any objection to that?

MR. HIRT: No objection Your Honor.

MR. WARFIELD: Yes sir. No objection.

• • •

[5-91] (Competency qualification of Jessie Sue Smith by the Court in chambers via video tape)

COMPETENCY QUALIFICATION

BY THE COURT:

A. Jessie.

Q. Jessie?

A. Jessie Sue Smith.

Q. And just so it's understood, we're in the presence of the counsel and the technician, I'm going to ask Jessie Sue some questions. How old are you Jessie Sue?

A. Four.

Q. Do they call you Jessie?

A. Yeah.

Q. Okay, you're four years old?

A. Um-hum.

Q. Do you go to school?

A. No.

Q. You don't.

A. I go to a babysitter.

[5-92] Q. You go to a babysitter?

A. Um-hum.

Q. Did you used to go to school?

A. Yes.

Q. Do you have any brothers and sisters?

A. Yes, I have Grayson, my little brother.

Q. Grayson?

A. Um-hum.

Q. How old is he?

A. He's two.

Q. Oh, you're older than he is, right?

A. Um-hum.

Q. Okay. Who else lives at home with you Jessie?

A. My mom and dad and I don't have anymore brothers or sisters.

Q. Okay. You go to a babysitter during the daytime?

A. Um-hum.

Q. What's her—his name or her name?

A. Her name is Martha.

Q. Martha?

A. Um-hum.

Q. You go there everyday?

A. Every school day I go.

Q. Every school you go?

A. Um-hum.

Q. What do you do at Martha's house?

[5-93] A. I play.

Q. Do you go to Martha's house?

A. Um-hum.

Q. You play?

A. Um-hum.

Q. Do you play with numbers and books and crayons and stuff like that?

A. Um-hum.

Q. What do you do when you go to Martha's house?

A. She has two little girls—she has one little boy and girl.

Q. Do you play with them?

A. Um-hum.

Q. How old are they?

A. Um, I don't remember.

Q. Are they bigger than you are, or smaller?

A. They're bigger than I am.

Q. Do you know your numbers or your letters or your A.B.C.'s and——

A. I know my A.B.C.'s, but I don't know my numbers and letters.

Q. You know your A.B.C.'s?

A. Um-hum.

Q. Would you tell me some of them?

A. Okay. Sings, a,b, the whole thing?

[5-94] Q. Sure if you can.

A. Okay. Sings, a.b.c.d.e.f.g.h.i.j.k.l.m.n.o.p.q. r.s.t.u.v.w.x.y and z.

Q. Very good. Try and speak a little louder. Pretend you're shouting at me so we can hear you, okay?

A. Okay.

Q. Do you know colors?

A. What?

Q. Do you know colors?

A. Uh-huh.

Q. What colors do you know?

A. Pink and brown and white and gold and silver and——

Q. Do you see anything—what color is this robe I'm wearing?

A. Black.

Q. Right, and what color is my tie?

A. Red, redish-brownish.

Q. What color is this piece of paper here?

A. White.

Q. That's right, that's a white piece of paper. What color is that ribbon on your dress?

A. Right here?

Q. Yes.

A. Pink.

Q. Okay, good. You don't know your numbers yet, do you?

[5-95] A. Un-un.

Q. Before you went—is it Miss Martha, is that her name?

A. Yeah.

Q. Okay. Before you went to Miss Martha as a baby-sitter, did you go to school before that?

A. Um-hum.

Q. Where did you go?

A. Children's Garden.

Q. Children's Garden?

A. Um-hum.

Q. How long did you go there, do you remember?

A. Un-un.

Q. And what did you do at Children's Garden?

A. I played with the other children there. I had one more—I had one little friend and her name was Alexa.

Q. Alexa, she was your good friend at Children's Garden?

A. Um-hum.

Q. Did you go to pre-school or anything like that before you went to Children's Garden?

A. I didn't hear what you said.

Q. Before you went to Children's Garden did you go to any othe [sic] place?

[5-96] A. Un-un.

Q. Did you go to pre-school or nursery school or anything like that?

A. I went to a bad school.

Q. What school was that?

A. Where I got hurt.

Q. Where you got hurt?

A. Um-hum.

Q. Do you know the name of that school?

A. I forget what it's called.

Q. Do you remember going to that school?

A. Um, um-hum. There was a bad boy there that hurt me.

Q. A bad boy?

A. Um-hum.

Q. Do you know some of the teachers at that school?

A. Um-hum.

Q. What were their names?

A. I have to think.

Q. That's all right, take your time.

A. I forget.

Q. You don't remember?

A. No.

Q. Do you remember any of the people who—any of the people who helped working there?

[5-97] A. Un-un.

Q. What was the boy's name, do you remember?

A. Un-un.

Q. Do you know the difference between telling the truth and telling a lie?

A. Um-hum.

Q. What's the difference, what's—what's a lie?

A. A lie is if you tell your—if you tell somebody that you have flowers in your garden and you really don't, that's a lie. The truth is if you really have flowers in your garden, that's the truth.

Q. Right.

A. But I don't.

Q. You don't have flowers in your garden?

A. I'm going to grow—I'm going to grow some someday.

Q. Okay. If I told you—is it—is it wrong to tell a lie?

A. What?

Q. Is it wrong to tell a lie?

A. Um-hum.

Q. Is it good to tell a lie?

A. No.

Q. If I told you that I was a lady would I be telling you the truth?

[5-98] A. A lie.

Q. Why?

A. Because you aren't.

Q. Okay, and if I said that you were a school teacher who taught the third grade at school, would that be the truth?

A. It would be a lie.

Q. Okay. If you told me that you went to high school and you went on a school bus and you went to high school, would that be tel—would you be telling me the truth?

A. A lie.

Q. Is it wrong to tell a lie?

A. Um-hum.

Q. Do you understand that we're going to ask you some questions here today?

A. Um-hum.

Q. Yes?

A. Um-hum. You know what?

Q. What?

A. Mu mom said nobody's allowed to take a picture of me.

Q. Is that right?

A. Uh-huh.

Q. Do you know that this man's taking your picture?

A. Um-hum.

[5-99] A. But my mom won't allow anybody to.

Q. Okay. Well, do you know that this man's taking your picture now.

A. No.

Q. That's just a camera, that's not like a—that's like a moving picture camera, that's not like a camera with a flashbulb, okay.

A. I know.

Q. Did your mom tell you why you were coming here today?

A. Um-hum. To talk about what the bad boy did to me.

Q. Did anything else happen to you at that school where the bad boy was?

A. Um-hum, um-hum. Do you know what he did to me?

Q. No what did he do to you?

A. Oh, my mom told me is all I'm going to talk about is the lady with the two thumbs.

Q. The lady with the two——

A. Um-hum, thumbs.

Q. Okay. Who was the lady with two thumbs?

A. I forget her name.

Q. Well, where did you ever meet her.

A. At the bad school.

Q. Was she there?

[5-100] A. Um-hum.

Q. Do you remember what happened at the school?

A. Yeah. You know what, she did something mean to me. She almost—she tried to kill me.

Q. She did?

A. Uh-huh. But I ran away. I ran into the school so she couldn't kill me.

Q. Do you remember that happening?

A. Um-hum.

Q. Did your mom—did you come today to this building with your mom?

A. Um-hum.

Q. Did she tell you what to tell me?

A. Yeah—no she didn't.

Q. Well, what did she say. Did she say you were going to come in and talk to a Judge?

A. Um-hum. She said I'm going to talk to the Judge.

Q. Did she tell you how to answer the questions?

A. Un-un.

Q. Well, if I ask you some questions and if these two people ask you questions about——

A. Am I supposed to talk into here?

Q. Oh, you can talk pretty close. This man's listening to what you say, so if you don't talk loud enough, he's going to tell us, okay?

[5-101] A. Okay.

Q. Do you remember going to that school with the lady with two thumbs?

A. Um-hum, yes.

Q. Are you going to tell us what you remember?

A. Um-hum.

Q. Is what you tell us going to be true?

A. Um-hum.

Q. Is it going to be the truth?

A. Yes.

Q. Do you know—do you understand you must tell me the truth? ——

A. Um-hum, yes.

Q. And when these other two people here ask you questions you must tell them the truth?

A. Yeah. I don't tell lies.

Q. Is it wrong to tell lies?

A. Um-hum.

Q. Do you like—have you ever told a lie?

A. No.

Q. Never.

A. Never.

Q. And are you going to tell us what you remember?

A. Um-hum.

Q. Did anybody tell you to tell us something that [5-102] wasn't true?

A. No.

THE COURT: Okay, Jessie, thank you. Just a minute. I'm going to have to go outside and talk to these two people for a few minutes. You can stay in here, okay?

THE WITNESS: Okay.

THE COURT: And we'll be right back in a few minutes.

(Sound pulled on video)

(Court and counsel return to the courtroom and counsel and the defendant approach the bench and the following ensued)

THE CLERK: Stand please.

THE COURT: Have a seat please.

MS. O'DONNELL: Your Honor, I assumed you wanted to see us at the bench.

THE COURT: Would counsel like to approach the bench.

MR. KOLODNER: Yes sir.

THE COURT: Go ahead. Does anybody want to be heard or—Mr. Kolodner or——

MS. O'DONNELL: The State feels that the voir dire of Jessie Sue Smith by the Court was sufficient.

THE COURT: Sir.

MR. KOLODNER: No comment.

[5-103] THE COURT: Based upon my questioning of the child in chambers I am satisfied that the child did communicate intelligently with us. That she has the ability to understand the questions that were asked of her and that she has the ability to frame and express answers. I'm satisfied that she has a recollection of the incidents which—with which she's been called to testify and to remember the matters about which testimony, obviously, is sought of her. I'm satisfied that she is aware of her obligation to speak the truth and to answer questions truthfully. So for those reasons, I am satisfied and have determined that the child is competent to testify as a witness.

There is the issue as I understand it before us of the appropriateness, as I recall it, of the Court receiving this child's testimony based upon my prior ruling that the testimony of children with reference to other crimes has to be substantiated by physical evidence. As I understand the proffer is, not proffer because I read the report of the physician, Dr. Shubin when it was submitted today——

MR. KOLODNER: As to the vagina area.

THE COURT: —as to vaginal injury, so that if there is no evidence offered of that fact, then of course it wouldn't be appropriate to receive this evidence at this time. So the only mechanism that I know is to out of the presence of the jury, send you all back there. I will remain [5-104] here with counsel and have you question the child concerning that issue.

MR. WARFIELD: Could I ask a question procedurally?

THE COURT: Yes.

MR. WARFIELD: If Ms. O'Donnell elicits that information, would the child then out of the presence of the jury be subjected to the cross-examination of the defense attorney, or would that be—would that stop there. I would

submit it would be inappropriate at that point for the defense attorney to cross-examine because the foundation would have been laid to allow it to come to the jury and then he would begin his full scope of cross-examination at that time.

THE COURT: Do you want to respond to that Mr. Kolodner.

MR. KOLODNER: Well first I would like to place on the record my objection to this child's testimony being taken on closed circuit television as——

THE COURT: For the reasons that you've——

MR. KOLODNER: —that I've previously stated. In addition to that I also object to this particular testimony being accepted because from the discovery that has been submitted to me, the child states as to this defendant, that there was an injury to her anus by this defendant. However, the medical reports submitted to confirm or to [5-105] substantiate that injury is to the vagina and show a normal anus. Therefore in the absence of medical testimony to substantiate the allegation made by, what I believe to be the testimony of the child, that her testimony should not be received as her testimony is only substantiated by another individual causing damage to the vagina and that medical report is the only medical report that the State has produced.

THE COURT: Of course, we don't know what the child's testimony is going to be and that's why we're using the safe guard of taking the child's testimony out of the presence of the jury.

MS. O'DONNELL: Which was the request, I might add, of the State and the State had brought those concerns to the Court's attention.

THE COURT: Yes.

MR. KOLODNER: But I just wanted——

THE COURT: I would think that if the State believes that it has elicited sufficient information on direct examination to get over that hurdle, the State should then ask to approach the bench and have me rule whether I believe the issue's properly before the jury, absent cross-examination. If the State doesn't get over that hurdle we obviously don't question the child further.

MS. O'DONNELL: Right, Your Honor, and as I also [5-106] —I understand that, and as I also mentioned yesterday in chambers with counsel and the Court and this morning again, I am going to direct, as I have stated, the child's testimony to relate only to this defendant. It is not the State's thought or nor should the State be penalized because this child's been allegedly abused by more than one person. However I will direct her testimony as I've stated and as she's stated to Your Honor to questions relating to the lady with the two thumbs. I have not purposefully brought this child in here to elicit information about anyone else (inaudible)

THE COURT: We would hope that she wouldn't relate that and it would seem to me that if she testifies to that out of the jury's presence, I would permit you to say we're not here to talk about that today.

MR. KOLODNER: I won't note any objection then if it will just be——

MS. O'DONNELL: I'm trying to make it as fair for the defense as I can Your Honor.

THE COURT: Let's see what happens.

MS. O'DONNELL: Thank you.

MR. WARFIELD: But I think the Court did note that she did bring that subject up spontaneously in the——

THE COURT: I understand and perhaps it would seem to me appropriate with some indulgence from the

defendant [5-107] to allow the State when they question her to say, we're not here to talk about that particular subject.

MS. O'DONNELL: Yes Your Honor. As I've stated before I have—it's been the only attempt I have to limit the scope of her questioning. I have not in any other way tried to control her.

THE COURT: Let's see what happens.

MR. WARFIELD: In all due caution, in cross-examination context then if it gets before the jury, again there's—it's possible that as a response to a question by defense counsel on and with no intent, obviously, that that subject could be raised. I mean, I don't think Ms. O'Donnell has a right to constantly intervene, but I'm saying perhaps Mr. Kolodner as well should be asked to also do that when he's asking the questions.

THE COURT: I would assume that neither of you would intentionally bring up some——

MS. O'DONNELL: No.

MR. WARFIELD: But in the broad context it could come in if you asked her has anybody said anything——

THE COURT: I guess all things are possible. If that happens, we have to be prepared to address it.

MR. WARFIELD: But all I'm asking the Court is that if Mr. Kolodner in his questioing—his cross-examination could do the same.

[5-108] THE COURT: I assume it's understood.

MR. WARFIELD: Thank you.

(Counsel and the defendant return to trial tables and the following ensued)

MS. O'DONNELL: Your Honor, with the Court's permission, Mr. Kolodner and I will return to the chambers.

(Ms. O'Donnell and Mr. Kolodner return to the Judge's chambers to question Jessie Sue Smith outside of the jury's presence)

(Video tape examination of Jessie Sue Smith)

BY MS. O'DONNELL:

Q. Okay Jessie Sue, this man is the Clerk, he's going to ask you to take a promise to tell the truth.

A. I am.

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. All right Jessie Sue, I'm going to ask you some questions, okay?

A. Okay.

Q. And I want you to remember something very important.

A. Okay.

Q. We're going to talk about the truth——

A. Okay.

Q. —the whole truth, and nothing but the truth——

[5-109] A. Okay.

Q. Do you understand that?

A. Um-hum.

Q. Do you promise to tell the truth?

A. Uh-huh.

Q. And we're going to talk about the lady with two thumbs?

A. I know.

Q. —okay. We're not going to talk about anybody else today.

A. I know.

Q. Okay?

A. Okay.

Q. So when you answer questions you talk only about the lady with two thumbs, okay?

A. Okay.

Q. How old are you?

A. Four.

Q. And do you remember going to a school where the lady with two thumbs was?

A. Yes.

Q. Was that a nice school or a bad school?

A. A bad school.

Q. What job did the lady with two thumbs have at that school?

[5-110] A. To try to kill—to um, be mean to children.

Q. Did the lady with two thumbs ever be mean to you?

A. Yes.

Q. Now I want you to tell us just what the lady with two thumbs did that was mean to you, okay?

A. Okay.

Q. Did she ever hurt your body?

A. Yes.

Q. Where did she hurt your body?

A. Right in—right here.

Q. Where are you pointing to? What is that part of your body called?

A. I don't want to——

Q. You don't want to say it. Well you have to say it, if you think it has a name.

A. It does.

Q. What is that part called?

A. I don't feel like saying it.

Q. How many places do you have down there?

A. Down where?

Q. Where does—tell me about all the things that the lady did—all the places where the lady (interference in microphone)

A. In the woods and—it's always in the woods.

Q. Well, where on your body did you get touched by [5-111] the lady with two thumbs.

A. Right there.

Q. You told me two places.

A. Um-hum.

Q. You told me right in the front and right in the back. Do they have a name? We need to use names.

A. Um.

Q. Do you call that place in the front your box?

A. Um-hum.

Q. And what do you call the place in the back?

A. Um, um, I don't want to say it because it's too private.

Q. Too private?

A. Um-hum.

Q. If I say it first, do you thing you can say it after that——

A. Okay.

Q. —(inaudible). Do you call that your butt?

A. Um-hum.

Q. What did the lady with two thumbs touch your box with Jessie Sue?

A. Um, with a stick.

Q. And what did she touch your butt with?

A. A prickly stick.

Q. Try and use that microphone, okay.

[5-112] A. Okay.

Q. Just answer questions.

A. I was trying to get this thing on——

Q. Just leave it like that.

A. Okay.

MS. O'DONNELL: I don't have anymore questions for you.

A. You don't

MS. O'DONNELL: Not right this minute. We're going to come back and ask you some more questions again, okay.

A. Okay.

MS. O'DONNELL: But we have to go talk to the Judge for one minute, okay?

A. Okay.

MS. O'DONNELL: And you sit there and just be very good——

A. Yeah.

MS. O'DONNELL: —and we'll be right back.

(Counsel leave chambers and return to the courtroom)

(Counsel and the defendant approach the bench and the following ensued)

THE COURT: Madam State's Attorney.

MS. O'DONNELL: Your Honor——

THE COURT: The State believes it has set a [5-113] foundation to elicit testimony from this witness.

MS. O'DONNELL: It has, I believe so Your Honor.

THE COURT: Okay. Do you want to respond Mr. Kolodner.

MR. KOLODNER: If it please the Court, I've gone through pages and pages—and I heard what this witness said, but I have read pages and pages of writings dealing with this witness and no place can I find that up until just now did she say that anything was ever placed in, as she calls it, the box, the only refer—by this defendant. The only place that she makes reference in the writings that I have is her rear. I heard what she said in here——

THE COURT: These writings that you have were provided——

MR. KOLODNER: By the discovery by the State.

THE COURT: These are her writings or writings of what she told others.

MR. KOLODNER: Of what she reports to others.

THE COURT: Well, it seems to me—I'm sorry. Had you——

MR. KOLODNER: And that's the basis for my objection. Today she says that she was touched in both places.

THE COURT: Obviously it's subject—her testimony is subject to cross-examination, but I'm satisfied there is a nexus between her testimony today and the physical findings [5-114] of the physician, of Dr. Shubin, who I believe conducted the examination to at least satisfy me that her testimony today is supported by physical facts, physical findings which would be at least consistent with my prior ruling on this type of testimony. Again, all of her testimony is subject to cross-examination, but I'm satisfied that the doctor who found evidence of vaginal injury, that that finding is consistent with this witnesses [sic] testimony and for that reason it should be received, again, subject to cross-examination.

Mr. Clerk, I ask you in the presence of the jury to again swear the witness in.

(Counsel return to trial tables and the following ensued)

(Ms. O'Donnell and Mr. Kolodner return to the Judge's chambers for examination of Jessie Sue Smith in the jury's presence)

(Jury enters courtroom)

(Video tape testimony of Jessie Sue Smith)

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Okay Jessie——

A. Um-hum.

Q. Talk loud enough so that——

A. I'm sorry.

[5-115] Q. —I can hear you, okay?

A. Okay.

Q. How old are you?

A. Four.

Q. And what is your whole name?

A. Jessie Sue Smith.

Q. And do you know what the difference is between telling the truth and telling a lie?

A. Yes.

Q. What does it mean to tell the truth?

A. It means that um, that um—it means that (inaudible)

Q. Sit back in your chair. If I said that I was a man, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said that you had a bald head, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said that you had on a pink flowered dress would I be telling the truth or would I be telling a lie?

A. A lie. Do you know what.

Q. Sit still so we can understand your answers.

A. You know what. I have a flowered dress that has pink flowers on it. I do.

Q. Now listen very carefully to my questions.

[5-116] A. Okay.

Q. Do you promise to tell the truth?

A. Yes.

Q. Is it good to tell a lie or is it bad to tell a lie?

A. Bad—bad to tell a lie.

Q. What happens to you if you tell a lie?

A. You can get in trouble.

Q. And when you come to court to talk to the Judge is it good to tell a lie or is it bad to tell a lie?

A. Bad to tell a lie.

Q. And do you promise to tell only the truth?

A. Yes.

Q. Do you promise to tell only what you know to be the truth?

A. Yes.

Q. And do you promise to tell only what you really remember?

A. Yes.

Q. Where do you live? Do you know your address?

A. No.

Q. Where do you live—do you know—if you were going to tell me—if I were to take you home, where would I go?

A. Um——

[5-117] Q. Do you know?

A. You would—I don't know.

Q. Do you know the name of the road that you live on?

A. Uh-huh, Carved Stone.

Q. Carved Stone.

A. Um-hum.

Q. Who do you live with?

A. My mommy and daddy and Grayson my little boy?

Q. How old is Grayson your little brother?

A. Two.

Q. And when was he two years old?

A. I didn't hear what you said?

Q. When was he two years old?

A. Um.

Q. When's his birthday?

A. I don't know.

Q. When is your birthday?

A. April 2nd.

Q. And how old will you be on your next birthday?

A. Um, (inaudible)

Q. Okay, how old are you now?

A. Four.

Q. And how old will you be on your next birthday?

A. (inaudible).

Q. Count the numbers. What are the numbers (inaudible).

[5-118] A. I'll be five.

Q. Do you go to school now or do you not go to school now?

A. I don't go to school now.

Q. Where do you go during the day with your mom and dad at work?

A. I play. When mommy and dad are at work I have to go to the babysitters.

Q. And what's your babysitter's name?

A. Martha.

Q. And how many kids go to Martha's to get—for babysitting besides you?

A. There's one boy.

Q. And what's his name?

A. Jonathan.

Q. Does Martha have any children of her own?

A. Yes.

Q. What are they're names?

A. Amy and Willy.

Q. Are Amy and Willy older than you or younger than you?

A. Older than me.

Q. What is the other little boy's name that goes there to be babysat?

A. Jonathan.

[5-119] Q. Jonathan?

A. Yes.

Q. Is he older than you or is he younger than you?

A. He's the same as me. He's four too.

Q. Before you went to Martha's where did you used to go during the day when mommy and daddy would be at work?

A. I didn't hear you.

Q. Did you ever go to school before?

A. Yes.

Q. Where did you go to school before?

A. Child's Garden.

Q. And before you went to Child's Garden, did you go to another school?

A. Yeah, but that was a bad school.

Q. Do you remember the name of the bad school or do you not remember the name of the bad school?

A. I don't remember the school—name. I don't remember.

Q. When you were at the bad school, was there a lady there with two thumbs?

A. Yes.

MR. KOLODNER: Objection.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. I'm going to ask you some questions only about that [5-120] lady with the two thumbs, okay?

A. (inaudible) of talking.

Q. Okay, just sit quiet now. I'm going to be asking you some questions and you can listen carefully, okay?

A. Okay.

Q. Was the lady with two thumbs at that school nice or was she bad?

A. Um, bad.

Q. Did that lady with two thumbs ever touch you?

A. Yes.

Q. Where did she touch you?

A. Sometimes she touches me in my private places.

Q. In your private places?

A. Yes.

Q. Where are your private places?

A. Right here and right here (indicating).

Q. Would you stand up and show me a little better where they are? Do they have names?

A. Yes.

Q. Tell me about where the—what the lady with two thumbs, where she touched you in your private places?

A. I showed you.

Q. You showed me?

A. Uh-huh.

Q. What did she touch you with?

[5-121] A. Um her hand.

Q. And where did she touch you with her hand?

A. What?

Q. Where did she touch you with her hand?

A. In these places.

Q. In the front place and in the back place you're pointing to?

A. Um-hum, yeah.

Q. Did she use anything when she touched you there?

MR. KOLODNER: Objection.

A. Un-un.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. Well, tell me what—tell me exactly what the lady with the two thumbs did?

A. Do I have to tell you?

Q. You have to tell me right now——

A. Okay.

Q. —and talk into the microphone.

A. Um, I forget.

Q. Where exactly—tell me what the lady with two thumbs did?

A. She um, sometimes she tries to take me to her house and steal me.

Q. Tell me about the place that she touched you?

[5-122] A. I did.

Q. How did it feel?

A. Yucky.

Q. When the lady with two thumbs touched you in the front place, what did that feel like?

A. It feeled yucky too.

Q. And where were you when that happened?

A. In the forest.

Q. Where was that forest?

A. Um, where these—where these big trees are, those big trees.

Q. Where were you when the lady with two thumbs touched you in the back place?

A. Know what she did—know what—what—know what the lady with two thumbs and the bad boy did to me?

Q. Tell me about the lady with two thumbs, okay?

A. Know what the lady with two thumbs did to me?

Q. What?

A. Buried me under the ground in a cage. But I—a teacher got me out.

Q. What did the lady with two thumbs call you?

A. What?

Q. What—what kind of words did the lady with two thumbs use?

MR. KOLODNER: Objection.

[5-123] A. Bad, bad.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. What were those words?

A. They're bad words and I don't want—I'm not allowed to say them.

MS. O'DONNELL: Witness with you.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. That's a real pretty dress you have on.

A. Thanks.

Q. You say you have one that has flowers on it too, don't you?

A. Um-hum. This one has little pink flowers.

Q. Does that one have pink flowers?

A. Um-hum. little ones. One, it has blue flowers and one has pink flowers.

Q. You have a lot of dresses, don't you?

A. Um-hum.

Q. Your shoes are pretty too.

A. Thank's. They're a little bit dirty though. A person (inaudible) polish them, but dad never does.

Q. Did you know that I was going to be here today?

A. No.

Q. No one told you that, that I was going to be here

[5-124] A. No.

Q. Have you ever been in this room before?

A. Um, yes.

Q. Do you remember when you were in this room before?

A. Yes.

Q. When?

A. Um, the first time I came here.

Q. I see. Were you here another time?

A. Yes.

Q. And this is another time?

A. Yes.

Q. How many times is that, three times?

A. No two times.

Q. Two times?

A. I've been here two times.

Q. Who brought you to this room?

A. My mother and um, um, I forget, Kate.

Q. Do you remember when that was?

A. Um, no.

Q. You know how to count real good. How many times did you say you were here?

A. Two times.

Q. Two times?

A. No audible response.

Q. And when you came in before you saw a doll, didn't [5-125] you?

A. Um-hum.

Q. I brought this doll here for you because I want to be your friend and I want you to be my friend?

A. Okay, okay.

Q. Want to be my friend?

A. Okay.

Q. Would you like to have this doll?

A. I think so.

Q. Okay, that's your's[sic], okay?

A. You know what, I have a purple bear too and I have a little donkey too.

Q. You have a purple bear?

A. I was wondering why that was there.

Q. You were wondering why that was there?

A. Yes.

Q. Well it was there because you're such a good girl.

A. Thank you.

Q. Now——

MS. O'DONNELL: Jessie Sue, would you put that on the floor until you're finished answering questions and listening please.

Q. When you leave you can take it with you, okay?

A. Okay.

[5-126] Q. Now, what—what was the last school that you went to?

A. Um. Children's Garden.

Q. Did anyone touch you there?

A. No. It was fun at Children's Garden but not at the school I just went to.

Q. When—who brought you to court today?

A. My mom and dad.

Q. Did your mommy tell you——

A. Oh, and somebody else did.

Q. Who?

A. Um. let me think. What was her name. Nancy.

Q. Who's Nancy?

A. My friend, but she's—but she's a grown up.

Q. Did your mom—I see. Did your mommy tell you what questions we were going to ask you today?

A. No.

Q. Did anyone tell you what questions we were going to ask you today?

A. No.

Q. Your mommy doesn't like Craig's School, does she?

A. No.

Q. She told you she doesn't like Craig's School, didn't she?

A. Um-hum.

[5-127] Q. Does she call it a bad school?

A. Uh-huh.

Q. I can't hear you.

A. Yes, she calls it a bad school.

Q. She doesn't like Mrs. Craig either, does she?

A. No.

Q. What does she call her?

A. Um, my mom——

Q. Does she call her bad?

A. She calls her the lady with two thumbs because she's got two thumbs.

Q. What does she call her?

A. The lady with two thumbs because she has two thumbs.

Q. She calls her the lady with two thumbs?

A. Yes.

Q. Did your mom tell you that—your mommy tell you that she was the lady with two thumbs?

A. Yeah.

Q. When did your mommy tell you that?

A. When I first got—I mean, I told my mommy that.

Q. When did your mommy first tell you that she was the lady with two thumbs?

A. When I first went there.

Q. Does anyone else call her the lady with two thumbs except your mommy?

[5-128] A. My dad does.

Q. Just your mommy and your dad?

A. Um-hum.

Q. Do you know anyone else that calls her that?

A. No.

Q. Your daddy doesn't like Craig's School either, does he?

A. No.

Q. Huh?

A. No.

Q. Does he call Craig's School bad?

A. Yes.

Q. When did he tell you that Craig's School was bad?

A. I told my daddy that.

Q. When the lady with two thumbs touched you, where did she touch you?

A. In my private places. I've got a itchy. I've got itchy right here. Sometimes I itch right there.

Q. Would you tell me again where the lady with two thumbs touched you?

A. Right here and right there (indicating)

Q. And you call the front—what do you call the front?

A. Your box.

Q. And what do you call the back?

[5-129] A. Your butt.

Q. Okay. Now what did she touch you with, her hand?

A. Yeah.

Q. When you don't tell the truth, what does your mommy do to you?

A. She—I get in trouble and I have to sit in the "time out" chair.

Q. You have to do what?

A. Sit in the "time out" chair.

Q. Oh, you have a "time out" chair?

A. Yeah.

Q. What's that. A little chair that you have to stay in?

A. It's a rocking chair.

Q. It's a rocking chair.

A. Um-hum.

Q. Is that when you don't tell the truth?

A. Yeah, but I tell the truth all the time.

Q. When did you have to sit in the "time out" chair.

A. Know what, I even have to sit in the "time out" chair when I—even sometimes when I be mean to my little brother, I have to sit in the "time out" chair.

Q. Is that the punishment chair?

A. Yeah, but I don't hurt Grayson, my little brother, anymore.

[5-130] Q. Did you used to try to hurt him?

A. No. Not like the bad boy did to me.

Q. When Grayson was born, you didn't like him, did you?

A. I did.

Q. Did you?

A. Um-hum.

Q. Oh, I thought you didn't like him. You liked him there?

A. Yeah.

Q. Now when is the last time you told something that wasn't true?

A. I didn't even—I don't even tell lies.

Q. You don't tell lies?

A. No.

Q. Well, did the lady with two thumbs try to kill you?

A. Uh-huh.

Q. When did she try to kili you?

A. When I first went there.

Q. And did you tell your mommy?

A. Yes.

Q. When did you tell your mommy?

A. I mean, I don't remember.

Q. Well, your mommy would pick you up at school, wouldn't [5-131] she.

A. Yes, but I don't go to school anymore.

Q. Now when you did go to the school where the lady with two thumbs was, did your mommy pick you up?

A. Um-hum.

Q. Okay, and the lady with two thumbs tried to kill you, is that right?

A. Yeah.

Q. Did you tell your mommy that?

A. Um, you mean when I first went there?

Q. Yes.

A. No, I forgot. I don't remember if I did or not.

Q. Well, if she tried to kill you wouldn't you get scared?

A. Yes.

Q. And wouldn't you tell your mommy if you were scared?

A. No.

Q. You don't remember if you told your mommy or not, huh?

A. No, I don't remember.

Q. Did the lady with two thumbs bury you under the ground?

A. Yes.

Q. What did she do, dig up the dirt?

A. Yeah and she buried me up into a hole. Then she [5-132] did another thing. She digged a hole and whoever walks in it can fall in there.

Q. What did she do, she dug a hole in the ground?

A. Yeah so if somebody falls in there she can get them. But never—everybody watches out and nobody fell in it.

Q. Well then did she put you in the hole?

A. No, no. I mean, yes.

Q. She did?

A. Yeah.

Q. And did she cover you with dirt?

A. No.

Q. You said that somebody saved you. Who saved you?

A. One of the teachers but I don't remember the teacher's name.

Q. Were you lying in the hole?

A. What?

Q. The hole the woman with two thumbs dug, were you placed in that hole?

A. Yes.

Q. And how long were you in the hole?

A. Um, um, for three hours.

Q. For three hours?

A. Um-hum.

[5-133] Q. How do you know that you were in the hole for three hours?

A. Because I was a smart little girl?

Q. You're a smart—oh, I know you're a smart little girl and were you in the hole by yourself?

A. Yeah.

Q. Were there rocks down there?

A. Yeah.

Q. A lot of rocks?

A. Yeah.

Q. Were the rocks on top of you or were you under them or were the rocks next to you?

A. The rocks were next to me.

Q. Okay. Tell me all about that. How did that happen? Did the lady with two thumbs take you someplace?

A. Yes.

Q. Where did she take you?

A. Um, to the grocery store but she brought me back.

Q. She took you to the grocery store?

A. Yeah, but she—I mean, she didn't take me anywhere. Well, she did. I forgot and she did.

Q. What grocery store did she take you?

A. The grocery store that—I don't remember what store she went to.

Q. When was that, when you were going to the school?

[5-134] A. Yeah.

Q. Was anyone else with you?

A. Um, no.

Q. Did she take you any other place?

A. No.

Q. Do you play make believe sometimes?

A. Sometimes.

Q. Okay, what do you make believe?

A. I pretend that—sometimes I pretend that I'm Rainbow Bright.

Q. Rainbow Bright, what's Rainbow Bright?

A. I have a doll of her but I lost her dress.

Q. You have a doll about Rainbow Bright?

A. Yeah.

Q. And what do you pretend that you are?

A. Sometimes I pretend I'm a little fairy.

Q. Okay and what do you do when you pretend you're a little fairy?

A. Well, I have this little magic wand and sometimes little fairy's [sic] have magic wands and I play with it to pretend that I have one.

Q. And what does that magic wand do?

A. Nothing. It doesn't do anything. I just pretend it does something.

Q. And what do you pretend to do with it?

[5-135] A. I pretend that it does magic.

Q. What can—what do you pretend that the magic wand does?

A. It makes everything disappear.

Q. That's a good trick, isn't it?

A. Um-hum.

Q. Do you do that often?

A. Yeah.

Q. What other games do you play that make believe?

A. Well, I play um, I don't really know anything I play. I don't remember anything else I play.

Q. Okay now, let's go back to where the lady with two thumbs put you in the ground. You were there for three whole hours huh?

A. Yes.

Q. Was it a long time or a short time?

A. I'm going to sit right here.

Q. Was it a long time or a short time?

A. Um, um, a real short time because a teacher helped me out.

Q. What did the teacher look like?

A. She was a good teacher, was one of the good teachers.

Q. Were the rocks on top of you or did you say they were next to you?

[5-136] A. Next to me.

Q. How many rocks were they?

A. There were four of them.

Q. Four rocks.

A. Um-hum.

Q. Okay and how big were they, small or big rocks?

A. Small rocks.

Q. Was the hole a big hole that you were placed in?

A. Yeah.

Q. Was there dirt around the hole?

A. Yeah.

Q. Who placed the dirt around the hole?

A. The lady with two thumbs.

Q. Did she have a shovel?

A. Yeah.

Q. Did you tell your daddy about the—being placed in the ground with the rocks and the dirt?

A. No.

Q. Did you tell your mommy?

A. No I forgot to tell them.

Q. When you went home that night, you forgot to tell them?

A. Yeah.

Q. It slipped your mind huh?

A. A. I forgot to tell them.

[5-137] Q. But the lady with the two thumbs did that, is that correct?

A. Yeah, yeah.

Q. Did anyone tell you to say that she did that?

A. No, because I—if my mom told me, or if my dad or mom told me to say that, I wouldn't. But they didn't so I wouldn't say it. So I didn't——

Q. You're saying it because it's true, is that right?

A. Yeah.

Q. Is that why you're saying it?

A. Yeah.

Q. And you're saying it's true that the lady with two thumbs dug this hole and put you in the hole for three hours——

A. Yeah.

Q. —with rocks, is that right?

A. Um-hum.

Q. And that's the truth, is that right?

A. Um-hum, yeah.

Q. And when you went home you forgot to tell your mommy and daddy about it?

A. Yeah.

Q. Now, is that the same truth like the lady touching you in your box? Is that the same kind of truth that you're telling?

[5-138] A. Yeah.

Q. And it's the same kind of truth that you're telling that the lady with the two thumbs touched you on your butt?

A. Yeah.

Q. And that's the same kind of truth you're telling me about the hole in the ground——

A. Yeah.

Q.—being buried, is that right?

A. Yeah.

Q. That really did happen——

A. Yeah.

Q. —the same way that you were touched in the front and back, is that right?

A. Yeah, yeah.

Q. No one told you to say any of those things?

A. No.

Q. But all of those things did happen?

A. Yeah.

Q. Just as you just said?

A. Um-hum.

Q. You're not making believe on any of these are you?

A. No. I'm not telling a lie.

Q. All of these things that you're telling me about the front and the back and the hole in the ground are all the [5-139] truth, is that right?

A. Yes.

Q. Did your clothes get dirty?

A. A little bit.

Q. Did your mommy ask you why your clothes were dirty?

A. No because the teacher washed them off.

Q. Does she take your clothes and wash them?

A. Yeah.

Q. Weren't you cold without your clothes?

A. No because she put me in a warm, snuggy blanket while she was washing them.

Q. Your teacher?

A. Um-hum.

Q. So the teacher took you from the hole in the ground and took your clothes off and washed the clothes, is that right?

A. Yeah.

Q. And she put a blanket around you?

A. Um-hum and then when she was done washing the clothes, she put them back on.

Q. Did they dry real fast?

A. Yeah.

Q. After she washed them, they dried real fast huh?

A. Yeah.

Q. Where were you staying—sitting when Frosty was [5-140] washing your clothes?

A. Um, on the ground.

Q. On the ground?

A. Yeah.

Q. Outside?

A. No.

Q. Where?

A. Inside.

Q. And who else was there?

A. Um, me, another bad person, because there is one more bad person.

Q. Did you get scratched from being next to the rocks or the rocks being on you?

A. Um. They were next to me, but I got a little bit scratched.

Q. Where did you get a little bit scratched?

A. Right here.

Q. What is that, your left leg?

A. I think.

Q. Near your ankle?

A. I think so.

Q. You think so, right about there?

A. Right there.

Q. You're indicating your left leg a little bit above your ankle. Did the scratch bleed?

[5-141] A. No.

Q. You just got scratched?

A. Yeah, but it's all gone now.

Q. It's all gone now?

A. Uh-huh.

Q. Did you show the scratch to your mommy?

A. Yes.

Q. Yes?

A. Yes.

Q. Did she put medicine on it?

A. Um, I don't remember. Am I all done now?

MR. KOLODNER: We're almost finished.

Q. Now you are telling us the truth about everything, aren't you?

A. Yeah, yes.

MR. KOLODNER: Okay, I have no further questions.

MS. O'DONNELL: I don't have any other questions. You're all done now Jessie Sue.

THE WITNESS: Okay.

(Video tape of Jessie Sue Smith ends)

(Counsel return to the courtroom)

THE COURT: We'll need the tape in evidence. Tell him to bring the tape in and put it in evidence. For the record, counsel are back in the courtroom. If you just wait a minute, counsel, we'll make the—we'll have the technician [5-142] give us the tape and receive it in evidence.

MS. O'DONNELL: Should we proceed Your Honor.

THE COURT: Well let's just wait one minute. The techni—they're winding up the tape. We'll receive it into evidence, then we'll proceed. Mr. Clerk, this is Court's four.

MS. O'DONNELL: The tape is completed Your Honor.

THE COURT: All right, I'll receive it into evidence as Court's exhibit number four. There's no objection I take it.

(Court's exhibit number four marked and entered into evidence)

MS. O'DONNELL: I would indicate that Lieutenant Pruit has indicated to Your Honor that the cap has been removed so the tape can't be changed.

THE COURT: Court's exhibit number four please.

* * *

[5-144] MS. O'DONNELL: The State would propose as the next witness Justin Peeples. He's a child and will testify through closed circuit television if he is deemed competent to do so.

THE COURT: How old is he, I'm sorry.

MS. O'DONNELL: He can testify——

THE COURT: No, how old is he. Just so I know. It's something to ask him.

MS. O'DONNELL: He is I think five years old. I'm pretty sure, yeah, I think he's five years old.

THE COURT: Is he on the premises now.

[5-145] MS. O'DONNELL: Yes, he's in my office or at least he was at lunchtime.

MR. KOLODNER: I would like to raise my same objections to this child as far as the closed circuit television and the for the use of the other crimes and for the same reasons that I recited in the other cases.

THE COURT: All right. I'll overrule your objection. Well let me send the jury back, talk to the child in chambers and go from there.

(Counsel and the defendant return to trial tables and the following ensued)

THE COURT: Ladies and gentlemen would you return back to the jury room for a brief period of time.

(Jury leaves courtroom)

THE COURT: All right counsel, I'll see you in chambers for a minute. Court will recess for a few mintues.

(Brief recess)

(Competency qualification of Justin Peeples by the Court in chambers via video tape)

COMPETENCY QUALIFICATION

BY THE COURT:

Q. I don't think we need that because you've got a good strong voice, don't you?

A. Yeah.

Q. All right, I'm here with Justin Peeples and with [5-146] counsel for the State and the defense and for the technician—and with the technician and Justin, I'm going to ask you just a few questions, okay?

A. Okay.

Q. And then when I finish these two people might want to ask you some questions, fair enough, okay?

A. Yeah.

Q. Now your name is Justin Peeples?

A. Yeah.

Q. Okay, how old are you Justin?

A. Oh about four years old.

Q. All right. Do you know your birthdate?

A. Yeah.

Q. When?

A. Well, it's a couple of weeks until Elliot's birthday starts.

Q. It's a couple of weeks until whose?

A. Elliot's birthday starts. You see we left him at Aunt Laura's house.

Q. Okay. So you're now four years old, right?

A. Yeah.

Q. Okay and who do you live with at home?

A. Well I live with mommy and also dad.

Q. Do you have any brothers and sisters?

A. No, I only have one brother.

[5-147] Q. And what is his name?

A. I already told you his name?

Q. Elliot?

A. Yeah.

Q. I wasn't sure, I'm sorry. I thought Elliot was your brother. How old's Elliot?

A. Oh, two and a half.

Q. So you're older than he is, right?

A. Yeah.

Q. Do you have any cats and dogs at home?

A. No.

Q. Okay. Now do you go to school Justin?

A. Yeah.

Q. Where do you go?

A. At Howard County Place—at Howard County Pre-School.

Q. At Howard County Pre-School, okay.

A. Yeah.

Q. Who's your teacher there?

A. I only have two teachers.

Q. Well, do you know their names?

A. Well, sometimes I can't remember their names, but sometimes in the evening I do.

Q. All right, is this one of those times when you might remember or do you think you can tell me their names now or?

[5-148] A. Well, no.

Q. Okay. Do other boys and girls go to Howard County Pre-School with you?

A. Sure.

Q. What do you do there?

A. Oh, well, I play and also I eat snacks.

Q. Do you learn a little bit too?

A. Yeah and also I play. They have lots of playing rooms.

Q. Good, good. What are some of the things you play there?

A. Well, well there's toys and on the other side there's a roast up games.

Q. A roast up game?

A. Yeah.

Q. Okay. Do you have any books? Does a teacher read you any stories or anything like that?

A. No. We read the stories by ourselves.

Q. Okay. Can you read by yourself?

A. Yeah.

Q. Okay. I didn't know that. Do you know some of your letters and your numbers and colors?

A. I know all of my letters and numbers and colors.

Q. All of them?

A. Yeah.

[5-149] Q. Tell me—count for me. Can you count for me? Can you tell me some numbers?

A. Sure.

Q. Tell me some. One——

A. One, two, three.

Q. Very good. Do you know any numbers after three?

A. Four, five, six.

Q. I'm afraid to ask you. Do you know any numbers after six?

A. Seven, eight, nine.

Q. How about your letters. Do you know your A.B.C.'s?

A. Yeah.

Q. Tell me your A.B.C.'s.

A. Well, it goes like this a,b,c,d,e,f,g,h,i,j,k,l,m,n,o, p,q,r,s,t,u,v,w,x,y,z.

Q. Very good, very good.

A. See someone—you see someone makes mistakes, you see like a to y and a to x.

Q. They leave out the z or something like that?

A. Yeah and leave out the y or something like that.

Q. I guess that could be a problem.

A. Yeah. There are some people that do.

Q. Okay. How about colors. You know colors of course?

A. Yeah.

Q. What color is this robe that I've got on here over [5-150] my shirt?

A. Black.

Q. Right. And how about this tie that I'm wearing, what color is that?

A. Red.

Q. Very good and this pad of paper here is—what color would you say that is?

A. Well, it's yellow and red and black.

Q. Very good, it has red and black lines, right?

A. Yeah.

Q. You go to Howard County Pre-School. Did you go to school before you went there?

A. No.

Q. You didn't?

A. No.

Q. Did you go to day care before you went to Howard County Pre-School?

A. No, but you see we're trying to find Elliot's birthday present.

Q. You lost Elliot's birthday present?

A. What?

Q. Did you lose it?

A. Yeah. But you see we're trying to find the vacation stuff for his birthday present.

Q. Where do you think it is, do you know?

[5-151] A. Yeah. It's at the front row at Caldor's.

Q. Do you know what it means to tell the truth and to tell a lie Justin?

A. Yeah.

Q. Is it bad to tell a lie?

A. Yeah.

Q. If I told you that I was a lady, would I be telling the truth?

A. No.

Q. Why?

A. Because you're—you would be lying.

Q. Right, because I'm not a lady, right?

A. No.

Q. If you told me you were a school teacher, would you be telling me the truth?

A. No.

Q. Why?

A. Because I'd be lying, if that is what I was doing.

Q. Okay, have you ever told a lie before?

A. No.

Q. Is it bad to tell a lie?

A. Yes.

Q. Do you know that we're going to ask you some questions here today?

A. Sure.

[5-152] Q. And you're going to tell me the truth?

A. Sure.

Q. Will you promise to tell me the truth?

A. Sure.

Q. Okay and you know that if you didn't tell me the truth it would be wrong, right?

A. Right.

Q. Okay. Who did you come here today with? Did somebody bring you today to this building?

A. Yeah.

Q. Who was it?

A. Well, mommy did. Oh, and Kate did. She's right back there.

Q. All right. She came over to this building with you?

A. Yeah.

Q. How did you come from your house, in a car?

A. Yeah.

Q. Who was in the car?

A. Oh, mommy was and I was and Elliot was, but we went to drop Elliot off to Aunt Laura's house, remember?

Q. Okay. Did your mommy tell you what to tell me?

A. Yeah.

Q. What did she tell you to tell me?

A. Well, I can't remember, because see sometimes [5-153] I remember and sometimes I don't.

Q. When I ask you certain questions are you going to tell me what you remember?

A. Yeah.

Q. You won't—will you tell me what people told you to tell me or what you remember?

A. Yeah.

Q. All right. Did anybody tell you to tell me something that wasn't true, that was a lie?

A. No.

Q. Do you remember going to the Craig's School, Craig's Country School?

A. Yeah.

Q. All right.

A. It was in my dream.

Q. It was in your dream?

A. Yeah.

Q. If I ask you some questions about the Craig's School or if these people ask you some questions about the Craig's School, would you tell us the truth?

A. Sure.

Q. Do you remember going to the Craig's School?

A. Sure.

Q. Did anybody tell you to tell us a lie about the Craig's School?

[5-154] A. No.

Q. So that if we ask you questions about the Craig's School, you're going to tell us the truth and not what somebody else told you?

A. Oh, sure.

Q. And do you know that it would be wrong to tell us a lie?

A. Yeah.

Q. Do you know where you are today?

A. No, where?

Q. Do you have any idea where you are?

A. Yeah.

Q. Where?

A. At Howard County Pre-School.

Q. Do you think that this is your school?

A. No.

Q. Do you know what building you're in today?

A. What?

Q. No, I'm asking. Do you know why I'm wearing this funny thing here?

A. No, why?

Q. Well, it's a long story. I'm not sure I know the answer Justin. Do you know you're in court today?

A. Yeah.

Q. All right and do you know when I—do you know [5-155] that I'm a Judge?

A. Yeah.

Q. Oaky [sic] and you know that I ask you questions or these two people behind you ask you questions, you must tell them the truth?

A. Yeah.

Q. Will you tell them the truth?

A. Sure.

THE COURT: Okay. Justin, I'm going to have to go outside for a few minutes.

A. Why?

Q. Why? I have to talk to them outside for a few minutes, is that okay?

A. Sure.

Q. Will you just sit here for a few minutes and Miss Kate will be back with Mr. Kolodner, that's this gentleman——

A. Okay.

Q.—and they're going to ask you a few questions, okay?

A. Okay.

Q. Okay, I'll be back in a few minutes, all right. You just get comfortable.

A. Okay.

(Court and counsel leave chambers and enter the courtroom and counsel and the defendant approach the bench [5-156] and the following ensued)

THE CLERK: Stand please.

THE COURT: Be seated please. Would counsel like to be heard as to whether it's appropriate for me to hear from this child as a witness.

MS. O'DONNELL: The State believes the preliminary questions of Justin deem him competent to testify.

THE COURT: Would you care to comment Mr. Kolodner.

MR. KOLODNER: I would object and would state for the record that I didn't think that he answered questions to make him qualify.

THE COURT: He certainly asked me tougher questions than you. I don't make light of Mr. Kolodner's concern. Obviously he has a right to believe that the witness is not competent. I'm satisfied that the witness is competent. I'm satisfied that based upon my questioning of

him he has the ability to communicate intelligently with us, to understand the questions that are asked of him and to frame responses and intelligent answers. I'm satisfied that he remembers being at Craig's Pre-School, that he has the capacity to observe and remember the matters about which he's being called to testify and I'm satisfied that he understands his obligation to speak the truth and to testify truthfully. So I will permit him to testify as a witness, since I find him to be a competent witness.

[5-157] Counsel, why don't you return to my chambers and I'll have the Clerk bring the jury out, all right.

(Counsel return to trial tables and the following ensued)

(Ms. O'Donnell and Mr. Kolodner return to chambers to examine Justin Peeples)

(Jury enters courtroom)

THE COURT: We're ready anytime you are. I don't think they heard me.

MS. O'DONNELL: Justin, I want you to sit there and listen very carefully and I'm going to ask you some questions.

THE WITNESS: Okay.

MS. O'DONNELL: And then Mr. Kolodner's going to ask you some questions.

THE WITNESS: Okay.

MS. O'DONNELL: First this man wants to tell you to promise to tell the truth.

THE WITNESS: Sure.

(Witness Sworn)

(Video tape examination of Justin Peeples)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Justin, what is your whole name?

A. Well, Justin Grant Peeples, of course.

[5-158] Q. And where do you live?

A. Well at 9172 Wind Flower Drive, Ellicott City, Maryland, 21043.

Q. And who do you live there with?

A. Elliot and mommy and dad.

Q. And who is Elliot? Tell us who Elliot is?

A. Oh, Elliot's my brother.

Q. Is he your little brother or your big brother?

A. Well, he's kind of big, but only just this old.

Q. Is he older than you or younger than you?

A. He's older.

Q. He's older than you are?

A. Yes, yes, he is.

Q. What's your dad's name?

A. Ron.

Q. And what's your mom's name?

A. Pat.

Q. And how old are you?

A. Four years old.

Q. I want you to sit up and I'm going to ask you some questions and I want you to tell the truth, the whole truth and nothing but the truth, okay?

A. Okay.

Q. Do you know what it means to tell the truth?

A. Yes.

[5-159] Q. Is it important to tell the truth?

A. Yes.

Q. Do you know what it means to tell a lie?

A. No.

Q. If I said that you had on a dress, would that be the truth or would that be a lie?

A. That would be the truth.

Q. That you have on a dress?

A. Yes.

Q. What do you have on?

A. Some shirts and pants. What else would I be wearing?

Q. Well, you just said you had on a dress. What am I wearing?

A. A dress too.

Q. If I said that you were old enough to drive a car, would that be the truth or would that be a lie?

A. I don't know how to drive a car. You always made mistakes when that's a lie.

Q. If I said you have on blue shoes, would that be the truth or would that be a lie?

A. That would be a lie.

Q. What color are your shoes?

A. Black.

Q. If I said you had on blue pants, would that be the [5-160] truth or would that be a lie?

A. That would be the truth.

Q. If I said you had on a pink shirt, would that be the truth or would that be a lie?

A. The lie.

Q. Where do you go to school?

A. At Howard County Pre-School.

Q. And what grade are you in, what is the name of your class?

A. The first grade.

Q. Where did you go to school before you went to Howard County Pre-School?

A. Do you know Elliot's birthday starts on Monday and I only—he goes to school on Monday, Wednesday and Friday and today's——

Q. Justin, I'm going to ask you some questions. I want you to answer my questions, okay?

A. Okay.

Q. Where did you go to school before you went to Howard County Pre-School?

A. Mrs. Craig's School in my dream.

Q. Was Mrs. Craig's School a nice school or a bad school?

A. A bad school.

Q. Do you remember Mrs. Craig?

[5-161] A. Yes.

Q. Was she a nice lady or was she a bad lady?

A. A bad lady.

Q. Did Mrs. Craig ever do anything bad to you?

A. Yeah.

Q. What did she do?

A. She poked me with a screwdriver in my dream. What else would she be doing.

Q. What did she poke you with—where did she poke with the screwdriver?

A. Well sometimes she poked me on my foot.

Q. Where else did she poke you, only the truth?

A. Well and sometimes she poked it on my leg.

Q. And where else did she poke it?

A. Uh, a place on my knee I hope.

Q. Mrs. Craig really did poke you someplace else, didn't she Justin?

MR. KOLODNER: Objection.

A. Yes.

(Sound pulled on video)

THE COURT: I'm going to overrule the objection and permit you to lead the witness. You may continue.

THE WITNESS: Was that my dad?

MS. O'DONNELL: No that was the Judge.

THE WITNESS: Oh.

[5-162] Q. Justin, did—where did Mrs. Craig really poke you?

A. Well, well, well, I told you about the foot and the leg and the knee.

Q. Where else did she really poke you?

A. Well, that's all the places that she poked me.

Q. Remember you promised to tell the truth?

A. Yes.

Q. Where else did she poke you? Is it true that she poked you someplace else?

A. No.

Q. Is it true she poked you in the hiney?

MR. KOLODNER: Objection.

A. No.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You can lead the witness, go ahead.

Q. Tell the truth—tell the truth, Justin, okay. Promise to tell the Judge the truth.

A. Okay.

Q. Where else did you get poked?

A. In my hiney, of course.

Q. And what did you get poked on your hiney with?

A. A screwdriver. What else would she poke me with.

Q. And who poked you there?

[5-163] A. Mrs. Craig did. Who else will.

Q. And is that the truth, the whole truth?

A. Yeah.

Q. That's not an easy thing to talk about is it?

A. No, but sometimes I don't remember these things that I am supposed to say.

MS. O'DONNELL: Mr. Kolodner, witness with you.

THE WITNESS: What?

MS. O'DONNELL: Mr. Kolodner's going to ask you some questions okay?

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Do you play ball in school?

A. Yeah.

Q. I bet you're a good ball player, aren't you?

A. Yeah.

Q. What's your best sport?

A. Well, basketball and football, and I can't forget soccer.

Q. Are you good at soccer?

A. Yeah.

Q. Real good, huh?

A. Yeah.

Q. You score a lot of goals?

[5-164] A. Yes.

Q. You beat the goalie, huh?

A. Yeah. Oh and also we have a bowling toy set.

Q. You know how to bowl?

A. Yeah if it's a bowling toy.

Q. You like toys?

A. Yeah.

Q. Well, you're such a good boy I have a toy for you. Would you like this toy?

A. Oh sure.

Q. How do you like that?

A. Well.

Q. Does that make us friends?

A. Sure.

Q. Okay.

A. What does this bear do?

Q. I don't know. It's called a "take-out" toy.

A. "Take-out" toy?

Q. Um-hum. I guess you'll learn how to do it, but let me put it down for awhile, then when you leave, you'll take with you, okay?

A. Okay.

Q. Just put it next to you. That's fine. Then you can take it with you when you leave, okay, and you'll figure it out.

[5-165] A. Yeah. I bet it will be a surprise for mommy.

Q. Yeah, she'll be surprised.

A. She'll be surprised.

Q. And now that we're friends, you're going to tell me the truth about everything, right?

A. Except I don't know the words.

Q. You mean you don't know exactly what you're supposed to be saying, is that what you mean?

A. Yeah.

Q. When you started to answer the questions you said, I don't always remember the words to the questions, is that what you mean?

A. Yeah, of course.

Q. Someone has told you the question, right?

A. Right.

Q. And then you just don't remember all the time what words you're supposed to say, isn't that right?

A. Right.

Q. Now, the last thing you said when you were being asked questions, you just don't remember the things I'm supposed to say, is that right?

A. Yeah.

Q. Is that what you said?

A. Yeah.

[5-166] Q. Okay. Now first of all, have you ever been in this room before?

A. No.

Q. You've never been here?

A. No.

Q. Okay now, who told you what things you were supposed to say?

A. Well, I can't remember what the people say that I have to say.

Q. Okay. Well was it your mommy who told you what to say?

A. No.

Q. Well who are the people who told you what to say?

A. I don't know.

Q. But was there some people who told you what to say?

A. Yes.

Q. Well when was that?

A. About Thursday in a week.

Q. Last week sometime?

A. Yeah.

Q. And you sort of forgot the questions and you forgot the answers, is that right?

A. Right.

Q. How many times did they tell you what to say?

A. One time.

[5-167] Q. Did they tell you this morning when you were coming here that you were going to be asked the same questions?

A. No. About in when Thursday week.

Q. It was on a Thursday?

A. Yeah.

Q. And try to remember real hard who told you the questions? Who was it?

A. Mrs. Craig.

Q. Mrs. Craig told you what questions?

A. No.

Q. You mean they told you the questions about Mrs. Craig, is that what you mean?

A. Yes.

Q. And they told you you were going to be asked about Mrs Craig, is that right?

A. Yeah.

Q. And they told you Mrs. Craig was bad, is that right?

A. Yeah.

Q. And they told you Craig's School was bad?

A. Yeah.

Q. And you sort of forgot the questions and what you were supposed to answer, is that right?

A. Right.

Q. Now they talked all about Mrs Craig?

A. Yeah.

[5-168] Q. Did they talk about anyone else?

A. Yeah.

Q. Who?

A. Well I can't remember the other teacher's name. The only teacher I know is Mrs. Craig.

Q. Okay, and that's who they were talking about, is that right?

A. Yes.

Q. Your mommy doesn't like Mrs. Craig, does she?

A. No.

Q. Why do you say that?

A. I don't know.

Q. Did she tell you?

A. No.

Q. Your mommy doesn't like the Craig School, does she?

A. No, uh-uh.

Q. Uh-uh, you say that real strong, huh?

A. Yes.

Q. Why, did she tell you?

A. Yeah.

Q. Did she tell you a lot of times?

A. Sure

Q. Did she tell you a lot of times she doesn't like Mrs. Craig too, right?

[5-169] A. Oh, yeah, sure, can't forget that.

Q. Can't forget that. Is that what they told you, not to forget that, huh?

A. Yeah. Why are those golden bracelets around your arm?

Q. Well I guess someone told me to wear them. Did—your mommy gets happy when you say bad things about Mrs. Craig, doesn't she?

A. No, yes. No, no she doesn't.

Q. Now do you play games, make believe games?

A. Yeah, yeah.

Q. What do you make believe that you are?

A. (Inaudible) I make believe I'm a bear.

Q. A bear?

A. Yeah.

Q. And what does a bear do?

A. Well, he roars, he roars, he roars loud like a lion.

Q. Do you sometimes believe you're a lion?

A. No.

Q. Just a bear?

A. Sure.

Q. And what else do you make believe that you are?

A. I don't know.

Q. Do you play make believe with your friends?

[5-170] A. Yeah.

Q. And what else do the rest of your friends make believe?

A. Well, I don't know. Did you know I have four more friends?

Q. I bet you have a lot of friends because you're a very nice young man.

A. Well they live in another house next door to Aunt Laura's house.

Q. You know sometimes you don't tell the truth though, do you?

A. Yeah.

Q. Okay. What—do you get punished when you don't tell the truth?

A. Yes.

Q. And how do you get punished? Do you have to stay in your room or do you have to sit in a chair?

A. I have to sit in the chair.

Q. What do you tell things—what—what things do you talk about that aren't the truth?

A. I don't know.

Q. But sometimes you do, you tell things that aren't the truth, right?

A. Yeah.

Q. When was the last time you got punished for not [5-171] telling the truth?

A. How about sixty weeks ago.

Q. Well that's a long time ago?

A. Yeah.

Q. Will your mommy get mad if you don't remember all the questions?

A. Sure.

Q. When Mrs. Craig touched you with the screwdriver—

—

A. No, poked me.

Q. —poked you with a screwdriver——

A. It was not touching, it's poke.

Q. —poked, is that what they told you to say?

A. Sure.

Q. Do you remember who told you to say that?

A. No.

Q. But someone did tell you, is that right?

A. Right.

Q. Well when Mrs. Craig poked you with the screwdriver did you tell your mommy about it?

A. No.

Q. Why?

A. Well—well, sometimes she comes to my house. But when she comes to my house I bounce away.

Q. Who is that Mrs. Craig?

A. Yeah.

[5-172] Q. Mrs. Craig came to your house?

A. Yeah.

Q. How many times did she come to your house?

A. Well about three weeks.

Q. Three weeks ago?

A. Yeah.

Q. And what does she do at your house?

A. Well—well sometimes she steals my games, but she doesn't know that they're mine.

Q. Did she steal your games three weeks ago?

A. No, four weeks.

Q. Four weeks ago?

A. Yeah, she slept real fast this morning.

Q. What did she do this morning?

A. She slept real fast at night.

Q. I see.

A. When I was a little baby.

Q. Four weeks ago she stole your toys, is that—your games?

A. Yeah. Oh you know what this is?

Q. What is that?

A. (inaudible) That's the thing—that's the (inaudible) that you (coughing) that tells you what number your pants are.

Q. Oh I see. Now when did Mrs. Craig come to your house, about three weeks ago?

[5-173] A. Yeah.

Q. Okay and she stole your—did she try to steal your games?

A. Yeah.

Q. Was she able to?

A. No.

Q. Who stopped her?

A. Mommy did.

Q. What did she tell her?

A. What?

Q. What did she tell her? Did she tell her to stop stealing your toys?

A. Yeah and she told her don't take anything unless someone else tells you they're—it's okay. Why is that phone cord tape there?

Q. Okay. Now did that really happen or are you making that up? Is that the truth?

A. Yeah. That happened in my dream.

Q. It happened in your dreams?

A. Yeah.

Q. Now you said that Mrs. Craig slept with you at your house. Is that—when did that happen?

A. About fifteen weeks.

Q. You mean a long time ago?

A. Yeah.

[5-174] Q. Now did that really happen or is that what you believe happened?

A. That's what I believe happened.

Q. Did Mrs. Craig poking you in your hiney really happen or is that something you believe happened?

A. That's something I believe happened.

Q. And is it—Mrs. Craig poking you in your hiney, is that what someone told you to say, or did it happen?

A. It happened in my dream.

Q. Are the questions that I'm asking you some of the questions someone told you——

A. Yeah.

THE COURT: Would counsel please pick up the phone.

THE WITNESS: Why did the Judge say——

(Sound pulled on video)

MR. KOLODNER: Okay Justin, I don't have any other questions.

THE WITNESS: Okay.

MS. O'DONNELL: I don't have any questions.

THE WITNESS: Is it okay for me to go now.

(End of video tape of Justin Peeples)

THE COURT: Sheriff, would you tell the Lieutenant to bring the tape in with him so we can file it as an exhibit.

(Counsel return to the courtroom and the following ensued)

[5-175] MS. O'DONNELL: Excuse me minute, Your Honor, somebody has to escort the child out of the courthouse.

THE COURT: Counsel, I'm going to receive as the next Court's exhibit the tape of the testimony of the young man who just testified, Justin Peeples, and I would be of

a mind to mark it as Court's exhibit number five, Mr. Clerk.

THE CLERK: Number six, excuse me, five Your Honor.

THE COURT: Number five. I assume there's no objection. It's received in evidence.

MR. KOLODNER: No objection.

THE COURT: Thank you.

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[Court Reporter's Certificate omitted in printing]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY

Case No. 15625

STATE OF MARYLAND

v.

SANDRA CRAIG

Filed
9-21-87
10:00 am

SECOND AMENDED MOTION FOR NEW TRIAL

Defendant Sandra Craig, by her attorneys William H. Murphy, Jr., M. Cristina Gutierrez, and Nelson R. Stewart, pursuant to Rules 4-331(a) and (c), hereby again amends the motion for new trial previously filed in this case for the reasons stated in *State v. Richard Bryan Wildermuth*, ___ Md. ___ (No. 2, September Term, filed September 10, 1987).

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[Certificate of Service omitted in printing]

[S1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

CASE NO. 15625

STATE OF MARYLAND

versus

SANDRA A. CRAIG,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Sentencing)

Ellicott City, Maryland

Monday, September 21, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR., Judge

APPEARANCES:

For the State:

A. GALLATIN WARFIELD, III, ESQ.,
MARY CATHERINE O'DONNELL, ESQ.,

For the defendant:

WILLIAM H. MURPHY, ESQ.,
CHRISTINA M. GUTIERREZ, ESQ.
NELSON R. STEWART, ESQ.

JANICE M. MERKLE
Official Court Reporter
Circuit Court Courthouse
Ellicott City, Maryland 21043

[S1-2] **PROCEEDINGS**

THE CLERK: Your Honor, calling Criminal Case Number 15625, State of Maryland versus Sandra A. Craig.

MR. WARFIELD: Good morning, Your Honor, for the record, A. Gallatin Warfield the third, and Kate O'Donnell, on behalf of the State.

MR. MURPHY: William H. Murphy, Jr., Your Honor, on behalf of Sandra Craig, along with M. Christina Gutierrez.

THE COURT: Counsel, there's some preliminary motions or matters you wish me to consider.

MR. MURPHY: Yes, Judge. As we indicated in Court, we wish to amend our Motion for New Trial in this case to reflect the issues decided in the case of State of Maryland versus, or rather, Richard Brian Wildermuth, W-I-L-D-E-R-M-U-T-H versus the State of Maryland, September term number two, filed on September tenth, 1987. An Opinion written by Judge Atkins. We feel that this case is almost identical to the one you've decided. To the extent that all that would really be necessary to make it identical, would be to change it to State versus Wildermuth to State versus Sandra Craig. The Court couldn't have been any clearer about what happened. What the Court said, very simply, was, that what Judge Williams did was deficient in two ways. Judge Williams, first of all, [S1-3] did not seek enough testimony from the experts in this case, and lo and behold, that happened here. And then, the Court said, more fundamentally, that Judge Williams did not personally question the child, as Judge Heller had done in the companion case, which they affirmed. And, lo and behold, we look at the record, the Court didn't question the child or any of the other children in this case. And bear in mind, Judge, each one of these four children's testimony is important. The State felt it was important. The State

put on all four because it felt that this kind of evidence would strengthen its case. And in this case, the Court did not question any of these children, and it was until the trial that there was any question by this Court. And it wasn't on the issues raised in this case. And so there's nothing in the record as there was in the companion case here of James Sylvester McKoy versus State, and that's M-C-K-O-Y, which would lead to the Court of Appeals sustaining or affirming what the Court did here. And so, because this case literally fits the Sandra Craig case like a glove, because the issues are identical, and because the findings in this Court do not exist. And because there is no way that the Court could, in a post-trial sense, make the findings because there was nothing asked by the Court of the children relevant to the issues involved, I believe that [S1-4] it is clear that this Court must grant Ms. Sandra Craig a new trial. One final thing, this case, the Wildermuth case and the McKoy case, were pending, in the Court of Appeals, the briefs had been filed, at the time that this matter was argued before this Court, and so, it was public knowledge that there were two things happening on these issues. Number one, that there was a challenge to the statute permitting video testimony in lieu of incourt testimony, and number two, the nature of those challenges, that is, the list of issues, which were used by other lawyers, to attack the procedure. All of these issues existed at the time of this case and were public. And so, certain duties flowed from the public nature of this. We understood what those duties were. We raised those issues as I'm sure the State will concede in its argument as a part of our amended Motion for New Trial in this case, and we tried to get the Court to do these things in the Jamal Craig case. And so, for those reasons, Judge, we believe that the Court ought to grant a new trial. There is no harmless error here. There is no escape from the clear requirement that the Court laid out as follows: "Moreover, Judge Williams never questioned or even ob-

served the child witness before he made his ruling. While personal observation by the Judge may not be the sine qua non," and I checked with Mr. Warfield before pronouncing that [S1-5] word, Judge, under Section nine dash one oh two, "it should be the rule rather than the exception". And so, the Court lays out that the rule is, that this Court must question the child. And then it goes further, it saids, "On the one hand, a Judge's subjective and self-justifying recollections of the child's demeanor, absent support in the record, will not be enough to justify finding, justify a finding that limits the right of confrontation." Now, that suggests real strongly, that any post-trial finding by this Court would be looked at with a great deal of skepticism as not being something they want this Court to do. On the other hand, as the Court saids, "Expert testimony may not be essential to establish the necessary predicate. For example, the testimony would apparently be sufficient when combined with the child's own testimony, and judicial observation of the child. We shall not attempt to list all the possible ways in which evidence may meet the standard, or all the ways in which it may fall short. We repeat, however,—They repeat, Judge, very rarely in these Opinions, and when they repeat, they mean it for emphasis, they say, "We repeat, however, that ordinarily the Judge should observe and question the child." And the State will say that you observed and questioned the child, but I think what they really mean is on the issues concerning video testimony. And the record is clear that [S1-6] the Court did not question the child on those issues. Now, finally it saids, "Testimony about the likely impact on the child testifying must be definite and related to the statutory standard and specific to the potential child witness, him or herself. There must be a particularized examination of all the circumstances concerning the impact of public testimony in the presence of the defendant, upon the emotional health of the child." And so, they grant Mr. Wildermuth a new trial. We believe, for the same reasons,

Sandra Craig is entitled to a new trial. I've been brief on my argument on this issue, because I'm anxious to hear how creative the State will be in attempting to have this Court not follow the rule. And, as enunciated by Wildermuth, and I'll have a brief rebuttal, if the Court will permit it.

MR. WARFIELD: Thank you, Your Honor. May it please the Court. It's easy to be creative with this because, although counsel cites the Wildermuth case, he does not cite the McKoy case, which is the companion case, which came down at the same time that the Wildermuth case was handed down. And the McKoy case was affirmed, and the reason that the McKoy case was affirmed was that, during trial, the only issue that was raised was the constitutionality of the statute. The evidentiary basis was not raised as an objection, nor was it in the Sandra Craig [S1-7] case. And I have provided counsel with a transcript of the arguments that were put before the Court, and very, very clearly, there was no argument to the Court on any other basis, other than the constitutionality of the statute. And that having not been raised at that time is very clearly waived. The rationale behind making objections, the rationale informing the Court when counsel is not satisfied with something that is going on, and wanting the Court to take some action, is set forth in Maryland Rule four three twenty-two. And the rationale being, that if you got a problem, bring it to the Court's attention and let the Court correct it. Well the problem that was presented to the Court was a constitutional problem. And the Court was asked to rule on the constitutionality, and the Court ruled on the constitutionality. There is a case called Smith versus State, sixty-four Maryland Appellate Report six twenty-five, which essentially states that if an objection is not made, and pursuant to Rule four three twenty-two, unless there are extraordinary circumstances, and in that case, the Judge's law clerk actually went out and did some research, and presented some information to the Judge,

and they ruled that that was extraordinary. But unless there are extraordinary circumstances, that it would not be reviewed. On appeal. So, the issue, quite frankly, and I will present some [S1-8] argument to the Court on the merits, but it's a procedural situation that we find ourselves in, and it was not raised by counsel at trial. And under the McKoy case, and obviously under the McKoy, and in light of the Smith case, which I just cited, the Court did not consider that the failure of the Judge in that case to actually talk to the children was of such extraordinary circumstances as to render that a reviewable decision, and therefore, that case was upheld. So, very, very clearly there's a waiver here, and it's not before the Court. But let's assume for the sake of argument, that it is before the Court. I would cite the Christian case to Your Honor, and it's three oh nine Maryland one fourteen. And the Christian case is one that I, it precedes the Martinez case in the Appellate Reports, so I'm sure that Mr. Murphy is familiar with it. It's in the Maryland Reports, that is. And Mr. Murphy cites the Martinez case for every conceivable proposition, but it's the case that is right before it. So I'm sure that he is aware of it. And essentially the Christian case saids, that the Rulings of the Court of an interlocutory nature, which would be any Ruling preceding sentencing, is still subject to the revisory power of the Court. So I think the Court has the opportunity, under the Christian case, to take a look at what the Court has already done. In other words, to look back in the [S1-9] Christian case, in fact the Court had granted a new trial. And then there was a case subsequent to that in which the Court of Appeals issued a Ruling that had some effect on that, and then the Court turned around and withdrew the new trial, in other words, overruled the New Trial Motion after it had already granted it, and then sentenced the defendant. So, I would submit, Your Honor, that the Court has the ability and the power, up til sentencing, to take a look at all interlocutory orders, and consider that,

in light of any subsequent information, as was done in the Christian case. And to evaluate and supplement, or to affirm, or to take whatever action that the Court feels and deems appropriate with respect to that particular order. And I would submit, Your Honor, that even assuming on the merits, and we're not, and our position, very clearly, is that this issue was waived, and that it is affirmable under the McKoy standard. But let's assume, and take a look at the Wildermuth standard, that the issue would be appropriate for determination. And I submit that the Court can examine the record and find many, many substantial factual differences which would support the underlying Ruling that the Court has already handed down. Without the testimony of the therapist, and I might point out that in the Wildermuth case, the child was nine years old. The age of the children in this case ranged from [S1-10] four to six years. There was testimony concerning physical manifestations of the children in terms of their ability to communicate. Rolling up into a ball. Hiding, in one particular case. Having breathing disorders, in the case of Brooke Etze. And there was an additional fact. These, incidentally, are facts, which did not exist in the Wildermuth case. There was specific testimony concerning threats and fear of the defendant. In other words, the fact that the child, the children, Brooke Etze in particular, and the other children who testified, and this is testimony in the hearing on the video, feared for their lives, and feared that Mrs. Craig would do something to them. And specifically, that point is addressed in the Wildermuth case, in footnote ten, in which it points out the fact that a witness has been threatened is a very significant factor in depriving the defendant of a face-to-face confrontation. So that is a specific point that was before the Court at that time, and which is, was addressed in Wildermuth, and was addressed to the extent that that is a significant factor. I think the court had an opportunity, and has had an opportunity, post the hearing, to observe the children. And

I think the Court can take that into consideration in, at this particular point, looking back, and determining if the original Ruling was, in fact, correct. Because now the Court has had the opportunity to observe [S1-11] the children, to observe their demeanor, to talk to them, in the context of the competency hearing. There is additional information, which has come to the Court's attention. The entire files of the therapist was put into the record in the New Trial Motion. Mr. Murphy raised the issue, raised the question concerning all the contacts of the child. During the course of that, there was information put before the Court as to a confrontation, post-trial, that Brooke Etze had with the Craig family, and how she doubled up, and had great difficulty at that particular time. And her father had to take her out. She physically, had a physical manifestation. That's before the Court. That's an example of an occurrance [sic] that would have, at least in hindsight, supported the fact that Brooke Etze would not be able to come in and face the individual who is alleged to have abused her. You had, I think, before the Court, a very, very, and the Court had the ability to see the demeanor of Mrs. Craig during the course of the testimony of various witnesses, and to see the fact that Mrs. Craig, in fact, with respect to a witness, Dilia Zeledon, Mrs. Craig was staring at her, very intensely, and it, and this was an adult witness, a former teacher at the school, and I had to instruct the witness not to look at Mrs. Craig because the witness was falling apart on the stand, by virtue of the very con- [S1-12] frontation here in Court. And I would submit that the Court had an opportunity to observe and to see the demeanor of the defendant, vis-a-vis the witnesses in the case, and to understand the ability of that particular type of conduct, and the effect that that would have on a witness. And that's an additional factor, I think, that the Court could take into consideration. Furthermore, the Court had the testimony of the parents concerning the demeanor of the children. Your Honor, I looked up sine

qua non because, although trying to school Mr. Murphy in its proper pronunciation, which I probably didn't even do myself. Sine qua non is Latin for without which not. That without which the thing cannot be. And this is from *Black's Law Dictionary*. An indispensible requisite or condition. And counsel himself in citing the Wildermuth case, has quoted the fact, and the Court has indicated and stated quite clearly, that it is not a sine qua non that the Judge interview the child before the Ruling. And I mean, counsel is saying that it is, and the Court is saying it is not. It is something that could have been done in that particular case. It's something which would have perhaps permitted, under the facts that were presented there, the Court to make the ultimate Ruling. But it is not an absolute, an indispensible requisite or condition. And very clearly, the Court said that. The facts and [S1-13] circumstances of each case have to dictate the ultimate propriety of the Court's Ruling. The underlying rationale of my interpretation of the Ruling, is that the information before the Court has to establish, essentially, that there's a de facto unavailability of the witness by virtue of the witness's distress, being in the courtroom setting, being faced with the defendant, and not being able to communicate. On the basis of all of the information that was before the Court, prior to the Ruling and subsequent to the Ruling, and on the basis of the facts that were established that are substantially different from the facts in the Wildermuth case. The age of the children. The fact of threats. The physical manifestations of problems that the children have had, and continue to have with respect to even discussing the incidents involved. When you put it all together, even under the Wildermuth test, which is not even applicable in this case because it was waived. But even under Wildermuth, there was enough evidence to support the Court's Rule. I would submit that the Christian case would enable the Court to take that into consideration, and say, I'm familiar with the case, I've read the case, and that there is nothing

in the record that would cause me to change my ultimate decision. And I think it's proper, and I think the Court has the ability to do that. I would submit on both cases. On [S1-14] both cases. That the Court's Ruling was proper. And I would ask the Court to uphold the Ruling, and to deny the Motion for New Trial. Thank you, Your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: Thank you, Your Honor. Well, once again I think the State finds itself asking this Court to make an exception to, what is now the established law of Maryland. The Court felt that it was the rule that the Court ought to question the child. And unlike that the (sic) State said in the McKoy case, Judge Robert Heller there, did question the child. If you look at page four of the Opinion, it saids, "During the course of", first of all, page three, it starts at the bottom. "Somewhat different circumstances preceded the use of nine dash one oh two in McKoy's case. His nine year old daughter, the alleged victim, was called to testify in open Court." Well, that didn't happen in the Sandra Craig case. "Was sworn and responded to a number of questions designed to determine her competence as a witness." Again, in open Court. That didn't happen in the Sandra Craig case. "During the course of the questioning, she became upset and seemed unable to answer further." Well, with the exception of a witness who wasn't permitted to testify in this case, that didn't happen in the Sandra Craig case either. "Although she indicated she "could answer the [S1-15] questions if we went into another room with the camera." And so, by being questioned in open Court by Judge Heller, this particular answer to his question was given. The Court used this as its basis for not saying that the Court didn't question the child in this case. Now, we don't have anything like that in this record. None at all. We have four children, who were all kept from coming into open Court in January, when this hearing took place. Contrary to the Rule of Wildermuth and McKoy. These four children had (inaudible

word) in Court. There were two experts in Wildermuth. There was only one expert as to Brooke Etze. There was only one expert as to Justin Peeples. One expert as to Jessie Sue Smith. And one expert as to Drew Woodbury. What the expert said on page thirty-seven to thirty-eight of the transcript shows the inadequacy of the foundation laid by that expert. She said in response to question, "On the basis of your training and expertise in contact with Brook Etze, can you tell the Court what that opinion is?" And this was about her ability to comment [sic] to a courtroom during the course of these trials and testify face-to-face with Ms. Craig. "My opinion is that it would very difficult if not impossible for Brooke to sit in the same room with Ms. Craig, and discuss the alleged abuse incidents. I believe it would also be difficult for her, because of [S1-16] her age to sit in front of a room of strangers, whether they be Ms. Craig or any others, and discuss the allegations. A second factor would be, she perceives herself as being threatened. She truly believes those threats would be carried out against her." Now, bear in mind, Judge, that at the time that Fred Kolodner was questioning this expert, he had not obtained any of the vital records in this case, which would have shown several things. It would have shown on numerous, previous occasions, Brooke Etze was able to talk about this to her mother, to her father, to her therapist, and to Kate O'Donnell. It would also show that on numerous, previous occasions, Kate O'Donnell was present during the therapy sessions to prepare this child for testimony in open Court. And Fred Kolodner did not request that the child be brought to open Court, like we did, and to be questioned by the Court, like we did. The reason he didn't request that was because he evidently didn't check, like we did, the Court of Appeals pending docket, with the realization that this case was being decided, and might affect the outcome of this litigation. And that there was a record that had to be protected. And so, we did that. We raised all of those issues because we felt

we had the duty to do that. Mr. Kolodner didn't do that. He evidently didn't feel he had the duty to do it. Consequently, Mr. Warfield exploits that breach of [S1-17] duty, and saids there was a waiver. Well, we have a Motion for New Trial that you ruled on, on the grounds of incompetency of counsel. And one of the things that we were going to raise, had we been permitted to complete our presentation, was this very failure by Mr. Kolodner, to do what we believe a reasonable, prudent, and competent criminal defense lawyer would have done. And Mr. Warfield can't say that it was not prejudicial to raise it, while at the same time, he saids that his failure to raise it, it fails, it prevents this Court from considering the issue. While I'm on that same topic of waiver. A waiver is an affirmative act by a lawyer. You have to know you're giving up a defendant's right, and you have to go ahead and give it up. And the only excuse for doing that is if there's some kind of viable trial tactic that you are persuing. Obviously, there could be no trial tactic in this case. The Court of Appeals, the Court of Special Appeals has been very clear about a lawyer's failure to raise a legal issue, which if raised, would have put his client in the ballpark. And that is, that it's incompetency of counsel, absent a viable trial tactic. On the basis of ignorance of law. So we're on firm ground on that. We could raise that same question as to each of the remaining three children because Mr. Kolodner failed to do what he was suppose to do as to each of them. And again, we [S1-18] can visit that failure of getting those records at his doorstep. We got them. We did what we're suppose to do. Q. E. D. Now, I think what the State is trying to get you to do on this waiver question, Judge, is to not deal with the issue at all. On the ground that it wasn't dealt with earlier. But then out of the same breath, the State saids, well, putting that aside, even though you didn't make a factual finding earlier, we want you to make one now. So don't deal with the issue because Fred Kolodner didn't deal with it, but

deal with the factual question even though you didn't deal with it back then. I think there's an inherent contradiction there that's obvious. There's an additional reason why the Court ought to deal with this question today. I think if we're honest with ourselves, putting aside advocacy for a moment, and just dealing with the fundamental truth of the question. Unless you've read the briefs, as we did, and know what the issues were, as we did, it would have been shocking that the Court would have read into the statute, the requirement, it would have been surprising that the Court would have read, strike shocking, into the statute the requirement that the Court must question the child. Because it doesn't appear on the face of the statute. And what the Court did in this case was very significant, and it said, that the right of confrontation does include the right of the [S1-19] witness to look at the defendant. The defendant's right to have that done. Because the Court believed that, and it went on in great length to say this, the defendant's right to have the witness be forced to look at her has a salutory affect on the truth-finding process because it's common knowledge that many people are influenced to tell the truth when they are confronted with the temptation of telling a lie in the presence of the person against whom they would lie. And so, it is clear from McKoy and from Wildermuth, that Ms. Craig lost her right under the confrontation clause as it's interpreted by the Maryland Court of Appeals, to have that part of the confrontation. And so the Court said, that in order to take that part of the right away, there has to be a very high threshhold that this Court must cross in order to make up for what is lost. And that threshhold includes, as a rule, that the Court must question the child face-to-face on the relevant issues involved. Not on competency. Not on the facts of the case. But on the issues and the statute, the child's ability to communicate in open Court as opposed to chambers. Very simple question could have been asked. Brooke, have you been in the courtroom? You think you

could talk to us out there? And Brooke would have been able to say yes or no. While I'm on the subject of Brooke, we have a video tape. And that video tape [S1-20] shows that Brooke Etze didn't have any kind of difficulty communicating about anything. The State told the jury, and the bragged later on, how intelligent, how straightforward, how poised this young lady had been, to boister [sic] our credibility. Can we infer from that that she wouldn't have been that way in open Court? Can the State infer from that that this is a young lady who would have had a problem testifying? And when you read the record, Judge, you see the record is almost identical to the one in Wildermuth. It's the same inadequacy in the record concerning the foundation. And as to the other kids, if you look at page thirty-nine to forty, as to Justin Peeples, you'll see an even greater inadequacy in the record in this case.

> "Question: Alright. What is that opinion again, based on your training and expertise in your contact with the young man involved, Justine Peeples?"
>
> "Answer: For Justin, I believe that Justin would be, once again, he would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure."

That just doesn't meet the statutory requirement. And I'm sure that Mr. Warfield and I both have great difficulty talking in front of a jury. I'm sure that we all have great difficulty standing up and giving our first speech. [S1-21] Great difficulty's not the test. Now, as to the second problem.

> "Question: Alright. Can you relate that to the emotional distress and the ability to reasonably communicate?"
>
> "Answer: Yeah. I think it would be very, it would impair his ability to communicate. My feeling is that if the goal would be to allow this child to be heard

to maximize that opportunity, and provided with privacy in his disclosure, and to remove the threatening agent, which he perceives as Mrs. Craig."

Period, that's it. Now that same page we got Jessie Sue Smith. Again, an inadequate record. As to Jessie Sue Smith, how much time did you spend with her? Then after going into that, she gives the foundation opinion on page forty-two.

"Question: And do you have, based on the time spent with her, with Jessie Sue Smith, in your expertise, do you have an opinion as to her ability to testify in either of those cases, in Court, regarding those allegations?"

"Answer: Yes."

"Question: Okay, and again based on your expertise and your contact with Jessie Sue Smith as to Ms. Craig, can you tell the Court what that opinion [S1-22] is?"

Let's stop there for a moment, Judge. This is an expert witness who has a particular specialty as a child counseling specialty. I guess the closest relationship it has to any other specialties, based on the testimony in this case, is psychiatry and psychology. These witnesses were never asked to give their opinion to a reasonable psychological certainty. As is required by every Maryland case that's ever dealt with expert testimony. True, they're not doctors. They're not psychologists. But they're not lay people either. They have a field. Their training is psychology. You heard me bring it out from Mary Burke, during one of the Motions. And I moved to incorporate that testimony into this record, and that is, that Mary Burke gained all of her experience in this area from courses in psychology and courses in psychiatry different in no way from those that doctors and psychologists take. And she based her opinion on that, and on her interaction with the child, and

her experience as a therapist. So here's what the opinion was.

"Question: Can you tell us what, the Court what the opinion is?"

"Answer: As to Ms. Craig, she perceives herself again, as her life has been threatened. Her family, her parents, and her siblings have been threatened. [S1-23] She believes that Ms. Craig is capable and willing to carry out those threats at home, and Jessie is fearful of this person. I believe that that fear would impair, preventing her to sit in front of person, or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information, which she has to share regarding these allegations."

"Question: How does that relate to emotional distress?"

"Answer: Well, Jessie's been in therapy for over a year, at this point, trying to deal with the issues that have been surfaced regarding the stress and destruction in her life, emotionally. I think that that would be a step back for Jessie, to have to face this person. I think that her fear, again, that her life may be jeopardized, or that of her family. When I discuss it by talking to her, you can see it would cause her not to share that information."

Again, woefully inadequate. And I'll spare the Court the reading of the Drew Woodbury part. It's just as bad. It's just as inadequate. And so, because the Court did not require, or because rather, the State did not ask the relevant questions. Did not get full and complete answers, for the reasons that I've just indicated, the State hasn't [S1-24] met its burden. Now the State mentioned that Christian gives the Court the right to make a post-trial finding in this kind of situation. Well, in the Christian

case, it was a post-trial finding that it had inappropriately followed the law. And so, what the Court did in Christian was simply reverse a legal judgment that it had made on the bona fides of a Motion for New Trial. Christian did not involve a post-trial factual finding. And, indeed Judge, if you want to incorporate some of the things that the State was saying that you ought to take into account, an evidentiary hearing would be required, and we would have the right to put on evidence to counter both the interpretation in the thrust of what the State said to clarify the misconstruction of what the State said. For example, this business about Brooke Etze doubling over when she was confronted with Sandra Craig is not what happened at all. And if you will recall what those records said, those records were basically contradictory. And, Brooke Etze misidentified someone as being Jamal Craig, according to my recollection of what happened, and not as Sandra Craig as the State suggests. And so, before you take into account any records, you have to have the benefit of testimony and argument on those records, if you're going to make a post-trial finding. Now, therefore the Christian case is not appropriate. This business [S1-25] about breathing disorders and all of that stuff. Judge, for the Court to make a post-trial finding, in the absence of both sides having an opportunity to have input into that finding by questioning the witness, by being able to call Brooke Etze to the witness stand, or by being able to question these therapists who were called, with reference to both what Brooke Etze saids on the stand, and with reference to the records that were withheld by the State, is a necessary prerequisite to making any post-trial finding. This Court hasn't permitted us to do that. The Court, indeed, has spoken as to the length of the Motion for New Trial, and the evidence that could be permitted. Of course, I would at this time, request that the Court permit us to call Brooke Etze, Justin Peeples, Jessie Sue Smith, and Kevin McDonough, so that we can, and Drew Woodbury rather, so

that we can have the opportunity to persuade the Court that they could get up and lucidly present their side of the story. Now finally, all that sine qua non means, and I don't know why we don't just reject all this——

THE COURT: It means a prerequisite, doesn't it?

MR. MURPHY: A necessary element, an essential agreement, that's all it means. I mean we try to get fancy because I guess we have to justify all the tremendous expense of our training and whatnot, and you know [S1-26] what the revolutionaries always say, the first people who ought to be killed are lawyers, and so I think we have to distance ourselves from the general public wheel by using magic words, instead of simple expressions. But it means what the Court saids it means. And, there's no escaping what the rule is, and what the Wildermuth case said. Wildermuth said, that simply calling an expert, without more, isn't enough. That's what you have. And so the Rule ought to be applied in this case. And, by the way, if the Court of Appeals had meant for the Court to make post-trial findings, it would have remanded Wildermuth with the express direction, as it is often done in other cases, to Judge Williams, to make post-trial findings in this case. I think whatever the record is, Judge, is the record. We're stuck with it. That's it. Under the terms of Wildermuth. So I would ask this Court to say that is the Rule. To say that the Rule wasn't followed in this case. To say that all you had on the issue when you moved, and all you're permitted to say about it now, is what the so-called experts say. To say that the expert testimony was inadequate on the two grounds, basically, the failure to say, to a reasonable psychological or psychiatric certainty, or whatever the appropriate standard was. And the failure to be any more certain in terms of the facts than they were, in terms of their opinion, and the failure to elicit [S1-27] enough facts from those experts, and therefore, grant Sandra Craig a new trial. Thank you.

THE COURT: Counsel, clearly the, no objection was made at the trial by the defendant to the Court's failure to interview the children. But even assuming that the issue is before this Court on all fours, that is, the effect of this Court's failure to interview the children before it determined to permit closed-circuit t. v. I've read the Wildermuth case, and I read it several times. I also looked up sine qua non because I thought it meant prerequisite, and apparently it does mean prerequisite. Wildermuth clearly does not say that the trial court must interview the child before deciding to permit closed-circuit t.v. I mean, I think we all, that's my reading of Wildermuth. Just so the record's straight, this Court was aware that there was a pending case involving closed-circuit t.v. that originated from Anne Arundel County before the Court of Appeals, or I think it originally went to the Court of Special Appeals, perhaps the Court of Appeals granted it directly. I don't recall how it got to the Court of, I know the Court of Appeals, Special Appeals did not decide Wildermuth. And clearly, I think counsel were aware, counsel who participated in this trial were aware of the Anne Arundel case being on appeal. And, you know, the Court has to be intellectually honest, there's [S1-28] no way it could have envisioned that the Court of Appeals in interpreting Section nine dash one oh two would, at some future time, state that ordinarily the trial judge, and this is a quote, "ordinarily the trial judge should observe and question the child". But, quite frankly, with the benefit of hindsight, nothing that I've become award of during the course of this trial, leads me to conclude that my decision to permit closed-circuit t.v. was inappropriate. I'm convinced that the record was such that it warranted this Court in taking the action that it did. Wildermuth does not require personal observations by the trial judge as a prerequisite to the use of closed-circuit t.v. Wildermuth saids, what, that there is a prerequisite. But it tells us that the prerequisite is that the trial judge determine that the child, that the

victim's testimony in a courtroom will result in the child suffering serious emotional distress, such that the child cannot reasonable communicate. The prerequisite setforth in Wildermuth is the legislative deter-, is the legislative prerequisite. The necessary predicate setforth in the statute. This Court made a determination. Quite frankly, this Court that its determination to permit closed-circuit t. v. was appropriate. If I'm in error, I'll be told I'm in error. But I'm convinced, based upon the record before the Court, that it was appropriate [S1-29] under, under the evidence presented to permit the State as it did, pursuant to Section nine dash one oh two. I don't find that this Court's failure to interview the children on that limited issue, prior to making it's determination, to permit closed-circuit t. v. is error. Because I don't find that the Court was required to do so. So, for those reasons, I'll deny the defendant's Motion for a New Trial. Or amended Motion for a New trial. Now, as to disposition, the record should reflect, gentlemen, or counsel, pardon me, that you have obtained a copy of the presentence that was order some time ago.

• • •

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No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where case-specific findings regarding the need to protect child victims are made and the witnesses, ages four to six, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure is used?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported, *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989), and is reproduced in the petition for writ of certiorari. (Pet. App. 1a-21a).

The opinion of the Court of Special Appeals of Maryland is reported, *Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988), and is reproduced in the petition for writ of certiorari. (Pet. App. 22a-69a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent Sandra Ann Craig's convictions

was filed on July 24, 1989. The petition for writ of certiorari was filed on September 22, 1989, and was granted on January 16, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . "

Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989 Repl. Vol.) provides:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

> (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
>
> (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
>
> (c) The provisions of this section do not apply if the defendant is an attorney pro se.
>
> (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

STATEMENT OF THE CASE

From August, 1981, through July, 1986, Respondent Sandra Ann Craig operated a group day-care center in Howard County, Maryland. (Tr. 3/18/87, at 25-29). In October, 1986, Craig was indicted for child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. (J.A. 1; R. 1-6). The named victim in each count was Brooke Etze, a six-year-old child who had attended Craig's center from August, 1984, through June, 1986. (R. 1-6; Tr. 3/16/87, at 144).[1]

In January of 1987, two months before Craig's trial, the State moved to invoke the Maryland procedure whereby a child abuse victim may testify at trial by one-way closed-circuit television. (J.A. 3-4).[2] The State sought to use this procedure for Brooke and other children whom Craig was charged with abusing.[3] At

[1] Both the transcript of Brooke Etze's competency evaluation and the petition for writ of certiorari erroneously refer to Brooke as a seven-year old. (J.A. 74; Pet. i, 4, 16). The videotape of Brooke's competency evaluation and the transcript of Brooke's trial testimony both reflect that Brooke said she was six years old. (Court Exhibit 1: J.A. 160; J.A. 92). Brooke's mother confirmed this when she testified that Brooke had been adopted from Korea and that, as best as could be determined, Brooke was born on April 11, 1980. (Tr. 3/16/87, at 141-43).

[2] Section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Code requires that a judge first determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989 Repl. Vol.).

[3] Sandra Craig was named in twelve additional indictments charging child abuse and related crimes. (Tr. 12/11/86, at 10, 13). Craig's son, Jamal, also was charged with having abused

a two-day pre-trial hearing on the State's motion, experts testified in detail about the trauma Brooke and each of four other child victims would suffer if compelled to testify in front of Craig at trial.[4] Craig was present at this hearing, and her counsel cross-examined the witnesses about their expert qualifications and their testimony. (J.A. 7-69).

Mary Burke, a child therapist with the Howard County Sexual Assault Center,[5] testified that she had conducted twenty counseling sessions with Brooke Etze, each lasting one to one and one-half hours. (J.A. 29, 38). When asked whether Brooke would be able to "testify face to face with Mrs. Craig," Ms. Burke said that "it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents." (J.A. 39).

some of the same children who were the subjects of indictments against Craig. (Tr. 1/20/87, at 77; Tr. 1/21/87, at 28-29). Although trial in this case proceeded only on the indictment involving abuse of Brooke Etze by Sandra Craig (Tr. 1/7/87, at 3), the State's motion for use of closed-circuit television by child victims, and the pre-trial hearing on that motion, addressed a total of eleven children (J.A. 3-4; Tr. 1/20/87, at 30-100; Tr. 1/21/87, at 2-69). Some of these victims claimed to have been abused by both Sandra and Jamal Craig. (Tr. 1/20/87, at 77; Tr. 1/21/87, at 28-29).

[4] Of the eleven victims that were the subject of the pre-trial hearing, the State will discuss the four children who testified via closed-circuit television in this case, as well as a fifth child whom the State called as a witness, but who was unable to testify.

[5] Ms. Burke held a Bachelor's Degree in Child Behavior and Development and a Master's Degree in Counseling Psychology and Human Development. (J.A. 30-31). She had been working full time with abused children since 1981, providing victims and their families with counseling and support services. (J.A. 31-32).

In explaining the basis for her opinion, Ms. Burke said that Brooke perceives "that she was threatened by Mrs. Craig and that she feels that her life is in jeopardy and part of her family and the household pet." (J.A. 39). Ms. Burke also commented that Brooke "truly believes that those threats will be carried out against her." (J.A. 39).

In addition to saying that, if faced with Craig and others, Brooke "would be unable to talk about what happened to her," Ms. Burke stated that Brooke "currently in preparation for the pending hearings is experiencing disruption in her breathing which is definitely manifesting distress and fear and anxiety visible in a physical manner and also an emotional manner." (J.A. 39-40). On cross-examination, Ms. Burke added that Brooke would probably stop talking, withdraw, and curl up in a ball if she were forced to testify in Craig's presence. (J.A. 44).

Ms. Burke also testified with regard to two other child victims, Justin Peeples and Jessie Sue Smith. She related that she had seen Justin, age four,[6] approximately eighteen times for counseling. (J.A. 40). She said that Justin "would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure." (J.A. 41). Ms. Burke also explained that Justin has difficulty discussing his abuse by Craig, and in particular "tends to change the subject which is his manner of avoiding the issue." (J.A. 41). He also "becomes agitated and depressed, . . . bursts into tears and would be unwilling or unable at that point to proceed." (J.A.

[6] Justin Peeples was born on June 3, 1982. (State's Exhibit D: Tr. 3/20/87, at 17).

41). To avoid impairing Justin's ability to communicate and to maximize the opportunity to adduce the child's testimony, it would be necessary "to remove the threatening agent which he perceives as Mrs. Craig." (J.A. 41).

Jessie Sue Smith, age four,[7] had been in counseling with Ms. Burke for approximately thirty-six sessions. (J.A. 41). This young child also perceived Craig as having threatened her life and the lives of her parents and her sibling. (J.A. 43). As Ms. Burke testified:

> She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations.

(J.A. 43). Ms. Burke added that it "would be a stepback for Jessie to have to face this person." (J.A. 43).

Dr. Gladys Sweeney, a licensed psychologist,[8] testified about five-year-old Drew Woodbury. (J.A. 49, 52).[9] She explained that she had seen Drew at ap-

[7] Jessie Sue Smith was born on April 2, 1982. (Exhibit D: Tr. 8/25/87, at 217).

[8] Dr. Sweeney held a Ph.D. in Counseling Psychology and a Master's Degree in Rehabilitation Counseling. (J.A. 49). She was formerly a faculty member of the Johns Hopkins School of Medicine's Department of Child Psychiatry. (J.A. 49-50).

[9] Drew Woodbury was born on August 22, 1981. (State's Exhibit A: Tr. 3/20/87, at 17).

proximately nineteen one-hour counseling sessions. (J.A. 52). Noting that Drew had experienced an "extreme level of high anxiety and distress" when talking about sexual abuse by Craig, Dr. Sweeney expressed the opinion that Drew's "ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig." (J.A. 54). Specifically, Dr. Sweeney noted that whenever Drew discusses the abuse, he exhibits "extreme regressive behavior, thumb sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kinds of behaviors." (J.A. 54). During cross-examination, Dr. Sweeney added that this behavior would be minimized and Drew's chances of communicating clearly would be enhanced if he were allowed to testify outside Craig's presence. (J.A. 55-57).

Anna Anderson-Hoover, a licensed clinical social worker,[10] testified that she had had fifteen therapy sessions with five-year-old Brian Endres,[11] each lasting one to one and one-half hours. (J.A. 21-22). She explained that Brian was "experiencing night terrors, nightmares about seeing Mrs. Craig" and had asked Hoover "and the police officers involved in this case not to see Mrs. Craig." (J.A. 24). Ms. Hoover also explained that "Brian has at times withdrawn into a fetal position when discussing the events" at Craig's center (J.A. 24), and that he suffers from panic dis-

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[10] Ms. Hoover held a Bachelor's Degree in Education and Psychology and a Master's Degree in both Child Development and Clinical Social Work. (J.A. 12). Sixty percent of Ms. Hoover's private practice was devoted to child victims of sexual abuse. (J.A. 13).

[11] Brian Endres was born on December 29, 1981. (State's Exhibit B: Tr. 3/20/87, at 17).

orders and an increasing level of anxiety (J.A. 22). When asked how Brian would react to a face-to-face confrontation with Craig, Ms. Hoover expressed the opinion that Brian would experience severe emotional distress and would be unable to communicate exactly what had happened to him. (J.A. 22-23).

Following argument of counsel, the hearing court rejected Craig's contention that her Sixth Amendment right of confrontation would be violated by use of the closed-circuit television procedure. (J.A. 59-67). The court ruled that the requisite predicate showings had been made as to each child:

> There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe that there's a need and its [sic] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102 assuming that the child's deemed to be competent to testify and the child's testimony is relevant and of course not otherwise objectionable and assuming those two predicates are met, that is that the child is determined to be competent and that the subject matter of the child's testimony is relevant and not otherwise objectionable, each of the children referred to in the evidence will be permitted to testify by means of closed circuit television

consistent with the procedure set forth in Section 9-102.

(J.A. 66-67).

Trial commenced in March of 1987. (J.A. 1). As part of its case in chief, the State called the five child victims who had been the subjects of the pre-trial hearing. Brian Endres could not testify at trial, because he was so uneasy that he refused to enter the judge's chambers for questioning on the issue of competency. (Tr. 3/20/87, at 82-83). The remaining four children, Brooke Etze, Drew Woodbury, Jessie Sue Smith, and Justin Peeples, testified via closed-circuit television, but only after they had been examined for competency in the trial judge's chambers.[12]

The closed-circuit television procedure was as follows: Craig and one of her two trial counsel remained in the courtroom with an Assistant State's Attorney, the judge, and the jury, while Craig's other trial counsel and another Assistant State's Attorney were located in the judge's chambers with the child witness and a technician. (J.A. 88). Craig and defense counsel in the courtroom were able to communicate privately with Craig's counsel in the judge's chambers by telephone, and a procedure was available for making and ruling on objections. (J.A. 88-89). Testimony was

[12] Each competency evaluation, including the aborted one of Brian Endres, as well as each child's trial testimony, is memorialized on videotape and in transcript form. (Brooke Etze - Court Exhibit 1: J.A. 160; J.A. 74-80, 89-153; Drew Woodbury - Court Exhibit 2: Tr. 3/20/87, at 80; J.A. 164-74, 176-96; Jessie Sue Smith - Court Exhibit 4: J.A. 242-43; J.A. 197-207, 217-42; Justin Peeples - Court Exhibit 5: J.A. 270-71; J.A. 244-70; Brian Endres - Court Exhibit 3: Tr. 3/20/87, at 90-91; Tr. 3/20/87, at 80, 82-83).

broadcast into the courtroom where everyone could see and hear it on two monitors. (J.A. 89).

The four child victims said that Craig had sexually abused them. Brooke related that Craig had kicked her in her "privates" and had touched her with a stick between her legs on numerous occasions. (J.A. 94-95). The three other children testified that Craig had perpetrated various other sexual abuses on them. Justin said that Craig had "poked" him in the "hiney" with a screwdriver (J.A. 259); Drew related that Craig had placed "something cold in [his] behinney" (J.A. 178); and Jessie recounted that Craig had touched her in her "private places" (J.A. 223).

The children's testimony was corroborated by expert medical evidence from Dr. Charles Shubin, a clinical pediatrician specializing in the field of child sexual abuse. (Tr. 3/17/87, at 131-61). Dr. Shubin, who had examined the four children, explained that all of the children exhibited healed scars in the posterior part of their bodies. (Tr. 3/17/87, at 165-79; Tr. 3/23/87, at 2-21). It was Dr. Shubin's opinion that the pattern of injuries to the genital and anal areas of the child victims was remarkably consistent and required the forcing of an object into a body opening. (*Id.*).[13]

[13] Brooke Etze's testimony was also corroborated, in part, by testimony from eight-year-old Amanda Jones. Amanda, who had attended Craig's center at the same time as Brooke, said that during daily naptimes, Brooke would go upstairs to Craig's office. Brooke would look sad when she went upstairs and would be crying when she returned. Amanda also described threats about loss of parental love that were made by Craig in Brooke's presence. (Tr. 3/17/87, at 78-89). Because Amanda did not claim to have been abused by Craig, she was not eligible to testify via closed-circuit television. *See* Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1) (1989 Repl. Vol.).

The defense presented forty-one witnesses: among these were numerous character witnesses, Craig herself, and Dr. Lawrence Wisso, a pediatrician and faculty member at the Johns Hopkins Hospital. Dr. Wisso, who had examined Brooke Etze one month before trial, explained that he had observed no scarring, but that his examination was hindered because Brooke was suffering from a urinary tract infection. (Tr. 3/26/87, at 172, 175, 179, 183-84). He also said that his examination could not rule out the possibility that Brooke had been sexually abused. (*Id.* at 191). Although Dr. Wisso had examined the three other children who testified via closed-circuit television, his testimony did not address his findings as to these children. (Tr. 2/3/87, at 44-52; Tr. 3/18/87, at 137-38; Tr. 3/26/87, at 172-93).

On April 2, 1987, the jury found Craig guilty of all counts. (J.A. 2). Sentencing was deferred, by a series of post-trial motions, until September 21, 1987. (J.A. 2). On that date, and prior to being sentenced, Craig urged the trial court to reverse its ruling on the use of closed-circuit television, citing a new decision in which the Court of Appeals of Maryland had interpreted Section 9-102 for the first time. (J.A. 272-78, 283-91).[14] With the benefit of both this decision and hindsight as to the entire trial, the court affirmed its pre-trial ruling. (J.A. 292-93). It then sentenced Craig to ten years' imprisonment, but granted Craig's request to remain at liberty pending appeal. (Tr. 9/21/87, at 58-59, 61-66).

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[14] See *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (decided September 10, 1987).

On appeal, the Court of Special Appeals of Maryland affirmed the trial court's judgment. (Pet. App. 22a-69a). The Court of Appeals of Maryland, reviewing the case on certiorari, reversed Craig's convictions. (Pet. App. 1a-21a). Relying on the Sixth Amendment's Confrontation Clause[15] as construed in *Coy v. Iowa*,[16] the court ruled that the closed-circuit television procedure "ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence, and is found by the judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." (Pet. App. 16a). Because the four children who had testified by closed-circuit television had not been questioned preliminarily in Craig's presence, the Court of Appeals reversed, saying: "[A]s we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." (Pet. App. 3a).

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[15] Although the court's opinion contains passing references to Article 21 of the Maryland Declaration of Rights, a provision that is virtually identical to the federal Confrontation Clause, it is clear that the Court of Appeals believed federal law compelled its conclusion. In any event, Maryland's high court did not indicate that Article 21 provides rights "distinct from, or broader than, respondent's rights under the Sixth Amendment." *Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987). Accordingly, the decision does not rest on an adequate and independent state ground. *Id.*

[16] 487 U.S. ___, 108 S.Ct. 2798 (1988).

SUMMARY OF ARGUMENT

The problems attendant to the detection, investigation, and prosecution of child abuse are of immense concern to the States. In an effort to ensure that child abusers are prosecuted, and at the same time lessen the trauma that young victims suffer during the criminal trial process, many state legislatures have enacted laws providing for protective measures such as one- and two-way closed-circuit testimony, videotaped testimony, and hearsay exceptions for certain out-of-court statements of child victims. In the wake of *Coy*, doubt exists as to when these ameliorative devices can be used consistently with the Sixth Amendment.

Although the Confrontation Clause reflects a preference for in-court testimony and for full and effective cross-examination, it has never been interpreted literally by this Court. Over the past century, this Court consistently has ruled that reliable hearsay is admissible and that the cross-examination right merely guarantees the opportunity to cross-examine a witness. Even after *Coy*, the Confrontation Clause need not be read literally, so long as compelling state interests exist and case-specific findings of necessity are made.

Two compelling state interests justify the use at trial of child-protective measures such as the one-way closed-circuit television procedure employed in this case: (1) the need to protect particularly vulnerable child victims from the trauma of testifying in the physical presence of the accused; and (2) the need to ensure that child abusers are brought to trial and that the testimony of child abuse victims is considered

by the fact-finders in ensuing prosecutions. As required by *Coy* and Maryland's statutory procedure, the trial court here made appropriate case-specific findings regarding the special need to use closed-circuit testimony, determining that the four young children were effectively unavailable to testify in the open courtroom in Craig's presence. The Maryland Court of Appeals erred, therefore, in ruling that the Confrontation Clause required the child victims to be subjected to the trauma of facing Craig before they could be deemed in need of special protection from that same trauma.

ARGUMENT

WHERE CASE-SPECIFIC FINDINGS REGARDING THE NEED TO PROTECT CHILD VICTIMS ARE MADE AND THE WITNESSES, AGES FOUR TO SIX, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE IS USED.

A. Child abuse prosecutions present unique problems, and the States have responded by enacting various child-protective procedures.

During the last decade, society began to realize that a large number of its children are victims of physical and sexual abuse.[17] It also began to realize that the

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[17] *See* American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985* 3, 18 (1987) (indicating that, between 1976 and 1985, annual reports of child maltreatment made to designated public agencies jumped from

child victimized by abuse is traumatized further when required to participate in the prosecution of her abuser.[18] And, it was readily apparent that without the child victim, who is often the only witness, child abuse cases frequently would go unprosecuted. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).[19] Fueled by these realizations, the States began to re-examine the traditional, adult-modeled, criminal justice system, which generally requires all witnesses in a criminal case to testify under oath in a public courtroom in the physical presence of the defendant.

To date, a substantial majority of state legislatures have enacted a variety of laws that seek to accommodate the unique needs of child victims. Twenty-one states now have provisions allowing for use of one-way closed-circuit televisions, one-way screens, or one-

669,000 to 1.9 million reports, with approximately 11.7% of the 1985 cases involving allegations of sexual abuse); American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged* 7 (1985) (indicating that as many as one in every three female adults was sexually abused as a child).

[18] Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 Crim. L. Bull. 164, 169-70 (1989); Foreman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 Hastings L.J. 437, 439 (1989); Hill & Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 819-21 (1987); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New. Eng. L. Rev. 643, 648-53 (1982); Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 732 (1985).

[19] *Accord* Foreman, *supra* note 18, at 437-39; Smith, *supra* note 18, at 731. *See also* Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. Sch. Hum. Rts. Ann. 441, 446 (1986) ("It is estimated that only 24% of all cases nationwide result in criminal actions." (footnote omitted)).

way mirrors.[20] Six states authorize the use of two-way closed-circuit televisions.[21] Two states provide for both one- and two-way closed-circuit televised testimony.[22] Thirty-five states allow preservation of a child's testimony on videotape for later use at trial or permit out-of-court statements of children pursuant to hearsay exception provisions. See Pet. App. 71a-74a. Additionally, the United States Congress is currently considering legislation that would permit the use, at trial, of two-way closed-circuit television, videotaped depositions, and a child's hearsay statements.[23]

[20] Ala. Code § 15-25-3 (Supp. 1988); Alaska Stat. § 12.45.046 (Supp. 1988); Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988); Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989) (amended by Conn. Pub. Act 89-177 (1989)); Fla. Stat. § 92.54 (West Supp. 1989); Ga. Code Ann. § 17-8-55 (Supp. 1989); Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989); Iowa Code Ann. § 910A.14 (West Supp. 1989); Kan. Stat. Ann. § 22-3434 (1988); Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989); La. Rev. Stat. Ann. § 15:283 (West Supp. 1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989 Repl. Vol.); Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989); Mich. Comp. Laws Ann. § 600.2163a (West 1988); N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989); Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989); Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989); R.I. Gen. Laws § 11-37-13 (Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989); Utah Code Ann. § 77-35-15.5 (Supp. 1989).

[21] Cal. Penal Code § 1347 (West Supp. 1989); Haw. R. Evid. 616; Idaho Code § 19-3024A (1989); N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989); Ohio Rev. Code Ann. § 2907.41 (Page 1987); Va. Code Ann. § 18.2-67.9 (1988).

[22] Minn. Stat. Ann. § 595.02 (West 1988); Vt. R. Evid. 807.

[23] See S. 1923, 101st Cong., 1st Sess. (1989); S. 1965, 101st Cong., 1st Sess. (1989).

In the wake of this Court's decision in *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988), many of these provisions have been attacked on the ground that they deny a defendant's constitutional right to confrontation. Without doubt, the *Coy* Court recognized that the Confrontation Clause expresses a strong preference for face-to-face in-court encounters between the accused and the witnesses against him. 108 S.Ct. at 2800-02. Nonetheless, it expressly left open the question of when, if ever, the Confrontation Clause permits an exception for the employment of a procedure like the one-way closed-circuit television device that was used by the child victims in this case. *Id.* at 2803. Given the purposes of the Confrontation Clause and this Court's decisions over the past century, use of one-way closed-circuit testimony is constitutionally permissible if based on case-specific findings of special need like those made by the trial court here.

B. The Confrontation Clause should not be construed literally.

The primary object of the Sixth Amendment's Confrontation Clause was to eradicate the practice of trial by affidavit and deposition, and to allow the accused to examine personally the witnesses against him. *E.g.*, *Barber v. Page*, 390 U.S. 713, 721 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Although the Clause contains the word "confront," and this Court has said that that word means "face to face," the Clause itself has never been construed as categorically guaranteeing a face-to-face encounter between every defendant and his accusers. When the necessities of a given case so require, this Court has determined that something less than physical confrontation will satisfy the Sixth Amendment.

Indeed, in its earliest cases, this Court eschewed a literal interpretation of the Confrontation Clause. *Mattox v. United States*, 156 U.S. at 240-44 (former testimony of witness admitted at subsequent trial, where witness had since died); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations admissible); *Motes v. United States*, 178 U.S. 458, 472 (1900) (recognizing in dicta that defendant who is responsible for absence of witness cannot claim right to confront); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (stating in dicta that Confrontation Clause "has always had certain well-recognized exceptions"); *Salinger v. United States*, 272 U.S. 542, 548 (1926) (acknowledging that confrontation right was not intended to abrogate common law exceptions to hearsay rule). *See also Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (recognizing in dicta that federal privilege of confrontation has not at any time been without exceptions and that even exceptions are not static and may be enlarged from time to time); *West v. Louisiana*, 194 U.S. 258, 263-67 (1904) (relying on federal Sixth Amendment cases to hold that use of absent witness's deposition did not deprive defendant of due process).

And, since holding twenty-five years ago in *Pointer v. Texas*, 380 U.S. 400, 406 (1965), that the Sixth Amendment's Confrontation Clause was applicable to the States through the Fourteenth Amendment, the Court has continued to reaffirm that the Clause need not be literally interpreted in every case. Even though the Court has, since *Pointer*, categorized confrontation cases into two broad groups—cases involving the admission of out-of-court statements, *e.g.*, *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States*

v. Inadi, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970), and cases involving restrictions on the scope of cross-examination, *e.g.*, *Olden v. Kentucky*, 488 U.S. ___, 109 S.Ct. 480 (1988) (per curiam); *United States v. Owens*, 484 U.S. 554 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam); *Davis v. Alaska*, 415 U.S. 308 (1974)—the Court's decisions continue to illustrate that the right of confrontation is not absolute when the necessities of the case so demand.[24]

Nothing in *Coy v. Iowa*, this Court's most recent case involving the Confrontation Clause, overruled the scores of confrontation cases that have been decided over the course of the last one hundred years. While the majority opinion in *Coy* emphatically stressed the importance of face-to-face confrontation, it did not say that what had previously been viewed as a preference

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[24] Insofar as the Confrontation Clause has been construed as not conferring an absolute right, it has not been treated differently than other clauses of the Sixth Amendment. The right to compulsory process does not prohibit absolutely the exclusion of a defense witness whose identity is not disclosed as required by a state's discovery rule. *Taylor v. Illinois*, 484 U.S. 400 (1988). The right to effective assistance of counsel does not guarantee a defendant the right to consult with counsel during a brief trial recess. *Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. 594 (1989). The fair-cross-section requirement does not guarantee a representative jury in a particular case. *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803 (1990). The right to a speedy trial does not guarantee a trial date within a specified period of time. *Barker v. Wingo*, 407 U.S. 514 (1972). And, the right to a jury trial does not apply where a defendant is charged with a petty offense. *Blanton v. City of North Las Vegas*, 489 U.S. ___, 109 S.Ct. 1289 (1989).

must now be viewed as an absolute right. 108 S.Ct. at 2800-03. Instead, the majority opinion merely recognized that (1) if exceptions to face-to-face confrontation do exist, they must be necessary to further an important public policy; and (2) where a procedure calling for less than face-to-face confrontation is not firmly rooted in our legal tradition, the necessity for such must be shown on a case-by-case basis. *Id.* at 2803.

Given what the *Coy* Court did and did not say, there has been no marked departure from this Court's earlier decisions regarding the Confrontation Clause. Even after *Coy*, the Clause does not demand face-to-face confrontation in a given case, so long as the necessity for less is supported by the record and furthers an important or well-established public interest. As explained in the next section of this brief, the use of Maryland's one-way closed-circuit television procedure furthers several important public interests, and its use in this case was amply supported by case-specific findings of necessity. Nonetheless, Maryland's high court misread *Coy* and condemned a procedure, which, under a proper construction of the Confrontation Clause, demands approval.

C. Maryland's one-way closed-circuit television procedure furthers the public interests of protecting children and of effective law enforcement, and the need to use the procedure in this case was amply established.

1. Several compelling interests are furthered by the use of the one-way closed-circuit television procedure.

Time and time again, this Court has recognized that children are vulnerable and need special protection. *Prince v. Massachusetts*, 321 U.S. 158 (1943) (up-

holding statute prohibiting girls under eighteen and boys under twelve from exercising any trade on public street); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding statute restricting sale of adult magazines to children); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion) (upholding restrictions on indecent broadcasting during day-time hours when children could hear it); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality opinion) (recognizing state's compelling interest in protecting confidentiality of records concerning child abuse); *Baltimore City Department of Social Services v. Bouknight*, 58 U.S.L.W. 4184 (U.S. Feb. 20, 1990) (recognizing juvenile court's interest in child safety). Indeed, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08, 611 n.27 (1982), this Court recognized that minor victims of sexual abuse may well need to be protected from trauma in the courtroom setting itself. And, four Justices of this Court have said that protection of child witnesses is sufficiently compelling to permit something less than face-to-face confrontation. *Coy v. Iowa*, 108 S.Ct. at 2805, 2809 (O'Connor, J., concurring, joined by White, J.; Blackmun, J., dissenting, joined by Rehnquist, C.J.).[25]

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[25] A number of state courts, including the Maryland Court of Appeals in the instant case, have concluded, as did the concurring and dissenting Justices in *Coy*, that the compelling interest of protecting a child witness can outweigh a defendant's right to meet his accuser face to face. *E.g., State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) (en banc); *People v. Thomas*, 770 P.2d 1324 (Colo. Ct. App. 1988) (cert. granted by Colo. Sup. Ct. on March 13, 1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, *cert. denied*, ___ U.S. ___, 109 S.Ct. 2103 (1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3219 (1989); *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, *cert. denied*, 188 Ga. App. 912 (1988); *Brady v. State*, 540 N.E.2d 59 (Ind. Ct. App. 1989); *State v. Hoversten*, 437 N.W.2d 240 (Iowa), *cert. denied*, ___ U.S. ___, 110 S.Ct. 212 (1989); *State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989); *State v. Presley*, 542 So.2d 1171 (La. App. 1989); *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989) (en banc); *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35, *cert. granted*, 117 N.J. 143, 564 A.2d 866 (1989); *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1572 (1989); *People v. Cintron*, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___ (1990); *State v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409, 412 (1988) (concurring opinion); *State v. Taylor*, 562 A.2d 445 (R.I. 1989); *State v. Thomas*, 150 Wis.2d 374, 442 N.W.2d 10, *cert. denied*, ___ U.S. ___, 110 S.Ct. 188 (1989). *But see State v. Murray*, 375 S.E.2d 405 (W. Va. 1988).

Of course, it is not only the prospect of testifying in a courtroom open to the public that is terrifying to a child victim. Having to face an adult authority figure who has been both physically and psychologically abusive is especially torturous for a child. For example, in this case Ms. Burke testified that Brooke Etze perceived Craig as having threatened her life and the lives of her parents. (J.A. 39). To a young child such as Brooke, such threats are very real. The child simply cannot be expected to understand that past threats of physical harm cannot be carried out in an open courtroom. After all, a six-year-old child is not a miniature adult; a young child lacks an adult's defense mechanisms and may be permanently damaged by having to face her abuser in the courtroom.

Studies have shown that the courtroom experience, particularly the experience of coming into the courtroom and facing the accused, is associated with increased behavioral disturbances in the already

traumatized child. *See Coy v. Iowa*, 108 S.Ct. at 2808-09 (Blackmun, J., dissenting); note 18, *supra*. Given this Court's prior recognition that children are vulnerable individuals who need to be treated differently, the State has a legitimate interest in ensuring that children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence. The State should not be forced to ignore the concerns of victims, especially young victims who are called upon to give public testimony about the humiliating and degrading experience of being sexually abused. *See United States v. Hasting*, 461 U.S. 499, 507 (1983); *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

In addition to its interest in protecting the once victimized child from additional trauma, the State has the separate, and equally compelling, interest in seeing that those who prey upon children are brought to justice. Because a child abuse prosecution is so heavily dependent upon the testimony of the victim, if the victim is unable to testify in the courtroom and the alternative of a protective device such as closed-circuit television is unavailable, the prosecution may be thwarted entirely. If this occurs, the terrible risk envisioned by the intermediate appellate court in this case could well become reality: "[T]he truth of the matter may never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation, perhaps (and, in some instances, likely) upon the same helpless victim." (Pet. App. 53a-54a).

This second interest, which has been variously characterized as the interest in effective law enforcement, *e.g., Ohio v. Roberts*, 448 U.S. at 64; *Richardson v.*

Marsh, 481 U.S. 200, 210 (1987); *Lee v. Illinois*, 476 U.S. 530, 557 (1986) (Blackmun, J., dissenting); the interest in the truth-determining process, *e.g., United States v. Inadi*, 475 U.S. at 396; *Tennessee v. Street*, 471 U.S. 409, 415 (1985); and the interest in the integrity of the fact-finding process, *e.g., Bourjaily v. United States*, 483 U.S. at 182; *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), comprises the touchstone of the Confrontation Clause and, indeed, the entire legal system. *See James v. Illinois*, 493 U.S. ___, 110 S.Ct. 648, 651 (1990) (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)) (" 'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.' "). Consonant with this core precept of the Confrontation Clause, this Court has allowed hearsay testimony, despite the absence of the declarant, *e.g., Ohio v. Roberts*, 448 U.S. at 74-77; and, it has permitted an available witness to testify, despite the fact that cross-examination was curtailed by the witness's memory loss, *e.g., United States v. Owens*, 484 U.S. at 555-64.

Consonant with this same core precept, the victim of child abuse who is "unavailable" to face the accused, but who is otherwise available for full cross-examination, should be permitted to testify via one-way closed-circuit television. The State, like the criminal defendant, is entitled to a fair trial. *See Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); *Snyder v. Massachusetts*, 291 U.S. at 122; *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). Although the right of confrontation runs to the defendant, and not to the State, the goal it expresses is the disclosure of truth and the attainment of a just verdict. *See Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803, 809

(1990). To force the State to forgo its legitimate interest in prosecuting child molesters, simply because the child victim is unable to come face to face with her abuser, exacts a price that the Sixth Amendment should not demand.

Coincidentally, the use of closed-circuit television, in addition to being the only vehicle for adducing a child's testimony in a given case, may actually enhance the truthfulness of the child's evidence. *See, e.g., Coy v. Iowa*, 108 S.Ct. at 2809 n.5 (Blackmun, J., dissenting); *Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 835 (1990); *State v. Sheppard*, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984); Bjerregaard, *supra* note 18, at 170-71; Hill & Hill, *supra* note 18, at 813-17; Smith, *supra* note 18, at 742; *The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143, 157 (1988). While adults may be more likely to tell the truth when forced to look the accused in the eye, the trauma of facing her attacker may well cause the molested child to become confused and unable to tell the truth. *Cf. Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. 594, 606 & n.6 (1989) (Marshall, J., dissenting) (noting increased likelihood of child-like witness's stating the truth had he had a few soothing words from counsel during courtroom recess). Because the testimony that comes to the fact-finder via one-way closed-circuit television may well be more truthful than whatever testimony, if any, might be adduced in open court, it is preferred. *Cf. United States v. Inadi*, 475 U.S. at 394-96 (co-conspirator's out-of-court statement during course of conspiracy may be more reliable than declarant's in-court testimony).[26] Without doubt, the

[26] Consonant with this reasoning, one-way closed-circuit television may well provide more accurate testimony than would a procedure using two-way closed-circuit television. Because the two-way procedure does not eliminate the psychological trauma that results from seeing the victimizer, the Maryland Court of Appeals' suggestion that this procedure is preferable (Pet. App. 16a-17a), cannot withstand scrutiny. If, as Justice O'Connor has suggested, a two-way procedure does not even present a confrontation problem, *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2804 (1988) (O'Connor, J., concurring), then this would be because it achieves the same effect as a face-to-face meeting.

State has a legitimate interest in bringing the preferred testimony before the fact-finder.

2. The use of one-way closed-circuit television by the child victims was based on appropriate case-specific findings of necessity.

Unlike the Iowa statute at issue in *Coy*, the Maryland statute governing the use of one-way closed-circuit television requires case-specific findings that the child victim needs the statute's special protection. Before allowing one-way closed-circuit testimony to be used here, the court had to find that each of the four child victims would suffer "serious emotional distress"; it also had to find that such distress would result in the child's being unable reasonably to communicate.

Although the *Coy* decision does not explain what factors a trial court should take into account when making a case-specific finding of necessity, this Court, in an analogous situation, has provided guidance. In *Globe Newspaper*, the Court held that a state could not mandate that the courtroom *always* would be closed to the public during the testimony of child sexual assault victims. 457 U.S. at 607-08. The Court did, however, indicate that closure might occur in a

particular case, if the trial court found that it was necessary after considering factors such as the victim's age, the victim's psychological maturity and understanding, the nature of the crime, and the desires of the victim and the victim's parents. *Id.* at 608. Here, the trial court was able to take into account similar factors before concluding that the child victims needed the closed-circuit television procedure to protect their physical and psychological well-being.

In the first instance, the court knew that the witnesses were only four to six years of age, a factor weighing heavily in favor of special protection. And, at a two-day pre-trial hearing, the court heard from highly qualified experts who had long-standing and well-developed relationships with the children. These experts, who, unlike the trial court, were specially trained to deal with abused children and their traumas, offered detailed evidence regarding why each child victim would be unable to face Craig.

For example, Ms. Burke testified that Brooke Etze firmly believed that her life and the lives of her parents and her pet were in actual danger from Craig. (J.A. 39). Ms. Burke expressed the opinion that Brooke would curl up in a ball and be unable to testify in Craig's presence. (J.A. 44). According to the therapists who treated Justin Peeples, Jessie Sue Smith, and Drew Woodbury, these children would be incapable of discussing the abuse that they had suffered, if forced to do so in Craig's presence. (J.A. 41, 43, 54). And, because Craig made a post-trial objection to the use of closed-circuit testimony, the court had the added benefit of considering its decision in the light of, among other things, the children's competency evaluations and their trial testimony.

The record here stands in stark contrast to the record that was before this Court in *Coy*. There, the Court was faced with a statute that categorically presumed unavailability.[27] No experts had testified before Coy's thirteen-year-old victims were allowed to shield themselves from Coy's visage. Indeed, no testimony or other evidence was offered to show that these victims, who were much older than the victims in this case, needed special protection from a physical confrontation with Coy.

Here, the use of the closed-circuit television procedure did nothing more than preclude a face-to-face meeting between the abused children and their abuser. Each child testified under oath and was subjected to full cross-examination by Craig's counsel. Additionally, unlike those jurors who are asked to consider a transcript of an unavailable declarant's prior testimony, *e.g.*, *Ohio v. Roberts*, 448 U.S. at 60, the jurors here were able to assess each child's demeanor through the use of monitors in the courtroom. Thus, the three primary guarantors of reliability—oath, cross-examination, and jury ability to observe demeanor—were present. *See Dutton v. Evans*, 400 U.S. at 88.

3. The decision of the Court of Appeals of Maryland misconstrues the Confrontation Clause.

Notwithstanding the fact that the record more than amply supported the trial court's findings of neces-

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[27] As it did in *Coy*, this Court has eschewed categorical presumptions in other contexts. *See Rock v. Arkansas*, 483 U.S. 44 (1987) (rejecting per se exclusion of hypnotically-refreshed testimony); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (invalidating mandatory court closure during testimony of minor victims of sexual assault).

sity, and notwithstanding the fact that the children were subjected to full and unrestricted cross-examination in the jury's view, the Maryland Court of Appeals held that the closed-circuit television procedure was improperly invoked because the children were not first compelled to confront Craig. By requiring such a meeting, Maryland's high court, under the guise of *Coy*, has engrafted onto the Sixth Amendment the unconscionable requirement that child victims of physical and sexual abuse be traumatized further before they can be deemed in need of special protection from trauma. Moreover, the procedure adopted by Maryland's high court imposes the intolerable risks that child abuse prosecutions will be aborted before they are ever begun and that less than truthful testimony will be adduced at trial. This procedure, which the *Craig* court referred to as "the high threshold required by [*Coy*] before § 9-102 may be invoked," (Pet. App. 3a), is not constitutionally mandated by the Confrontation Clause.

Contrary to what the Maryland Court of Appeals has said, the *Coy* decision did not establish a procedure that requires the already traumatized child victim to be further tormented. Nor did the *Coy* Court set out some, other, elaborate set of procedures to be followed before child-protective devices could be invoked.[28] Indeed, to have done so would have run

[28] In this regard, it matters not whether a state has adopted a one- or two-way closed-circuit television procedure, a procedure for videotaped testimony, or a new exception to the hearsay rule for child statements. So long as the state procedure permits the trial court to exercise discretion, as is true in Maryland, there is no reason for this Court to draft a comprehensive set of standards to guide discretion in every case. *See Taylor v. Illinois*, 484 U.S. at 414.

counter to this Court's long-standing policy of according great deference to a state's establishment and implementation of criminal trial rules and procedure. *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Patterson v. New York*, 432 U.S. 197, 201 (1977); *Chambers v. Mississippi*, 410 U.S. at 302-03. By construing the *Coy* decision as it did, the Court of Appeals mistakenly concluded that the Sixth Amendment unequivocally demands face-to-face confrontation. It does not.[29]

If left standing, the Court of Appeals' construction of the Confrontation Clause results in the following incongruity. Excited utterances and present sense impressions of child victims will be allowed into evidence because they fit within firmly-rooted exceptions to the hearsay rule. *See* Fed. R. Evid. 803(1)-(2); *Ohio v. Roberts*, 448 U.S. at 66. Yet, the live testimony of these same child victims will be prohibited, even though it could be subjected to full cross-examination, merely because the testimony could not be adduced in the open courtroom in the defendant's presence. Given that live testimony is the better, and thus the preferred, evidence, there can be no reason why, under the Sixth Amendment, child witnesses should not be allowed to give live testimony via a closed-circuit

[29] Maryland's high court also failed to take into consideration this Court's decision in *Kentucky v. Stincer*. Like the competency hearing at issue in *Stincer*, the hearing regarding use of a one-way closed-circuit television procedure does not involve questioning about the substance of the witness's testimony, but involves a collateral issue. *See* 482 U.S. at 740-41. Accordingly, under *Stincer* a defendant has no right to confront the child on the issue of whether a one-way closed-circuit television procedure should be allowed.

hookup, so long as case-specific findings of unavailability to testify in the courtroom have been made.

CONCLUSION

The proper interpretation of the Confrontation Clause must "be determined in a given instance by a blend of historical understanding and adaptation of purpose to contemporary circumstances." *Williams v. Florida*, 399 U.S. 78, 124-25 (1970) (Harlan, J., concurring); *Ohio v. Roberts*, 448 U.S. at 64. It is not unreasonable to ask that technological advances, unknown in the eighteenth century, be used to protect a limited class of child victims—those who are so traumatized by the presence of their abusers that they are unable to testify in the courtroom. To permit these young children to present evidence from a judge's chambers does not endanger the Sixth Amendment rights of criminal defendants. The Confrontation Clause need not and should not be construed to deny child victims this small measure of security.

The State of Maryland therefore respectfully urges this Court to reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the sixth amendment requires, as part of the integrity of the factfinding process, live, face-to-face confrontation and cross-examination, in the presence of the defendant, the judge, and the factfinder, for all circumstances in which the evidence lacks inherent reliability?

2. Whether an underinclusive statute, not employing the least restrictive alternative, which denies face-to-face confrontation, and which infringes upon the rights to counsel, trial by jury, compulsory process, and fair trial is outweighed by the State's proferred compelling state interests?

3. Whether a nonspecific finding that a child fact witness would suffer severe emotional distress by testifying in a courtroom is sufficient to constitute the requisite individualized finding of trauma, causally connected to testifying in the presence of the defendant?

4. Whether the holding of the Court of Appeals of Maryland, based solely upon the trial judge's failure to personally question and observe the child fact witnesses, as required under state statute, constitutes a plain statement of independent and adequate state grounds?

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STATEMENT OF THE CASE

Sandra Ann Craig was convicted of child abuse, assault, and related charges, based essentially on testimony of Brooke Etze, which was received by the jury via one-way closed-circuit television. Brooke, almost seven years old at the time of trial, claimed that between September 1984 and June 1986 (the entire time period of her attendance at the Craig Country Pre-School), when she was between four and six years old, Mrs. Craig hit her "private parts" with a stick and stuck her with thumbtacks. This testimony was corroborated by the testimony of Justin Peeples, four years old at the time of trial, who claimed that Mrs. Craig put a screwdriver in his anus at some time between March 1985 and February 1986 (the entire time of his attendance at the Craig Country Pre-School), when he was between two and three years old; by the testimony of Jessie Sue Smith, five years old at the time of trial, who claimed that Mrs. Craig put a stick in her anus at some time between January 1985 and April 1985 (the entire time of her attendance at the Craig Country Pres-School), when she was between two and three years old; and by the testimony of Drew Woodbury, five years old at the time of trial, who claimed that between January 1985 and November 1985 (the entire time of his attendance at the Craig Country Pre-School), Mrs. Craig put an unidentified object in his anus when he was between three and four years old. These children were permitted to testify under the "other crimes" exception.[1]

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[1] The children's allegations were made after a six-month intense and highly publicized investigation launched as a result of a report of suspected sexual child abuse based on the comment of a teacher, who worked at another day care facility, to a health department nurse about a child, who had previously attended the Craig County Pre-School. That child allegedly reported to someone else that she had a dream about Pinnochio. The investigation includei sending letters to all parents of all children who had attended the Craig Country Pre-School, outlining the allegations of sexual child abuse. A meeting was held where further information about the allegations was disseminated and parents were urged to have their children "evaluated" at the Howard County Sexual Assault Center. Not surprisingly, the "flood" of allegations then began.

Mary Burke, Brooke's therapist, who was not qualified at trial as an expert, was permitted to tell the jury that Brooke was an abused child, who manifested the symptoms of child abuse, and was permitted to relate Brooke's allegations of abuse by Mrs. Craig. The children's parents were permitted to tell the jury what their children told them about being abused.

Dr. Charles Shubin, a pediatrician, testified that Brooke had one small scar in her vagina consistent with being penetrated by a stick. He was permitted to describe her vagina as being abnormally large. He characterized both the size of her vagina and the scar as "healed sexual injuries." He testified that Jessie Sue had a "severe sexual injury" to her vagina and that her vagina was also abnormally large. He testified that Justin and Drew had small scars in their anuses, which he similarly characterized as "sexual injuries."

For the defense, Dr. Larry Wissow, a pediatrician appointed by the court to examine the children, testified that Brooke's vagina was of a normal size for her age. The defense called Dr. Leopold Walder, a clinical psychologist, for the purpose of rebutting the opinions of Mary Burke that Brooke manifested the behavioral profile of an abused child and that she had been abused. However, the trial judge did not permit Dr. Walder to so testify. Dr. Walder did testify that it was possible for adults to influence children to make false complaints of child abuse.

On rebuttal, the prosecution called Dr. Leon Rosenberg, a clinical psychiatrist, who testified that it was not possible for adults to interact with children in such a way as to cause them to make false complaints of child abuse.[2]

Before trial, the State requested that the children not be required to testify in open court, but rather be allowed to testify out of Mrs. Craig's, the jury's, and the judge's presence, through one-way closed-circuit television, as authorized by section 9-102 of the Maryland Courts and Judicial Proceedings Code Annotated. The trial judge heard testimony from the

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[2] This Court in *Coy* noted the possibility of malevolent or well-intentioned adults coaching children. Social scientists, psychologists, psychiatrists, and attorneys have documented this phenomena of false accusations of child abuse.

children's therapists and concluded, without questioning or observing any of the children, hearing from any other witnesses, or exploring any alternatives, that all of the children should testify at trial via one-way closed-circuit television. To justify the denial of Mrs. Craig's right to face-to-face confrontation, the State called Mary Burke, who was neither offered nor qualified as an expert.

The Court of Appeals of Maryland characterized the testimony regarding the need for the child fact witnesses to testify via one-way closed-circuit television as follows:

> The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said what "would cause him the most anxiety would be to testify in front of Mrs. Craig . . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she "would probably stop talking and she would withdraw and curl up." With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions" while the other would "become extremely timid and unwilling to talk."

Craig v. *State*, 316 Md. 551, 568-69, 560 A.2d 1120, 1128-29 (1989).

The trial judge heard "expert" testimony concerning all eleven child fact witnesses in all indictments then pending.[3]

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[3] Six months later, during the related trial of Mrs. Craig's son, Jennifer Cleveland, one of the children who was a subject of the section 9-102 hearing, was found incompetent to testify, thereby forcing the State to enter a nolle prosequi in the middle of its case. The child could not even recall attending Mrs. Craig's pre-school, did not know who Jamal Craig was, and could not identify him at the time of trial. This child, like the four child fact witnesses who testified in this case, was neither observed nor questioned by the trial judge, on the issue of whether live, face-to-face confrontation with Jamal Craig would render her unable to testify. The judge refused to reopen the section 9-102 hearing for further evidence regarding any increased maturity of the child fact witnesses in that case.

A civil suit, *Jane Doe 1, et al.* v. *Sandra A. Craig et. al.*, in the

The trial judge did not observe or question any of the children. In fact, the judge's first observation of any of the four child fact witnesses in the instant case occurred during the trial on the merits.

At the time of the section 9-102 hearing, there had been no disclosure of the voluminous and detailed materials, which were obtained post trial. The documents concerning the investigation of this and related cases revealed: (1) the type and amount of influences to which each of these children had been subjected; (2) their prior statements accusing others of the abuse Mrs. Craig was charged with committing; and (3) the children's misidentifications of Mrs. Craig on prior occasions.

After the trial, Mrs. Craig discharged her trial counsel and hired present counsel. Mrs. Craig filed a motion for new trial. Before and during the hearing on the motion, counsel obtained, by subpoena, the therapists', psychologists', and psychiatrists' notes of each of the many therapy sessions that they had with the four children in the instant case. Defense counsel also obtained by subpoena the records of the Howard County Health Department, the Howard County Department of Social Services, and the Howard County Sexual Assault Center.

These documents (Motion for New Trial exhibits A thru YY; Court of Appeals Joint Record Extract at E. 1691-1779) (hereinafter MFNT Ex. ___; COA JRE at ___) established that Mary Burke, Brooke Etze's therapist, believed that "fantasy and reality were mixed up for this child" at the time of Brooke's allegations (MFNT Ex. F; COA JRE at E. 1705). Her notes revealed that Brooke told Dr. Shubin that a child named "Mica" caused the injury to her vagina (MFNT Ex. E; COA JRE at E. 1704). Brooke told Ms. Burke that "Jamal" had put his penis in her vagina and hurt her "privates" with his hand. Brooke also

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Circuit Court for Howard County, Case No. 87-CJ-6902, was filed by many of the parents and children against Mrs. Craig and others. Stacey Meyers, one of the plaintiffs, was also one of the child fact witnesses in related criminal cases against Mrs. Craig and Jamal Craig. Stacey, who was eight at the time, was deposed, *by her own lawyers*, over a six-hour period, in the presence of numerous counsel, while sitting in face-to-face close proximity to Mrs. Craig.

said that other children "bit" her in her private parts and that Mrs. Craig had hit her *with a rock, not a stick as she had testified at trial* (MFNT Ex. EE; COA JRE at E. 1732). Mary Burke's notes indicated that Brooke had *misidentified* Zena Craig, who was 17 at the time, as being Mrs. Craig, who was 40, and Jamal Craig, who was 15 at the time, as Michael Craig, who was 42 (MFNT Ex. II & JJ; COA JRE at E. 1746, E. 1747). The notes also revealed that Brooke implicated children named "Stacey" and "Shannon" as perpetrators of the alleged abuse, that she had accused a "black boy" and a "red-haired boy" of injuring her in her "privates," and that a boy named "Chris" bit her in her "privates" (MFNT Ex. D; COA JRE at E. 1702). The records revealed similar information about Jessie Sue Smith, Drew Woodbury, and Justin Peeples (MFNT Ex. C, L, N, Q, R, S, T, U, V, W, Y, AA, BB, CC, DD, HH, PP, & RR; COA JRE at E. 1696, 1712, 1714, 1716, 1717, 1718, 1719, 1722, 1723, 1724, 1726, 1728, 1729, 1730, 1731, 1745, 1753, 1755).

Finally, the records revealed a wealth of information casting doubt on the credibility of the children, their competency to testify, and their supposed inability to testify live face-to-face in a courtroom in the presence of Mrs. Craig, the jury, and the judge. At the hearing on the motion for a new trial, the prosecutor, who was called as a defense witness, testified that she had attended ten to twelve therapy sessions with Brooke Etze, during which much of this exculpatory evidence was revealed (T. 8/11/87, 1a-168 to 1a-169) (COA JRE at E. 529, E. 530). Likewise, the prosecutor attended dozens of other sessions with the other children (T. 8/11/87) (COA JRE at E. 521). Mrs. Craig challenged the withholding of exculpatory evidence in her motion for new trial, which was denied. The Court of Appeals of Maryland granted certiorari on this issue. "However, because of the reversal, we need not address petitioner's contention that she was improperly denied certain exculpatory information to which she was entitled under *Brady* v. *Maryland*, 373 U.S. 83 (1963). She now is in possession of this material and will be able to make appropriate use of it in the event of a new trial." *Craig* v. *State*, 316 Md. 551, 555 n.3, 560 A.2d 1120, 1121-22 n.3 (1989).

During trial, the one-way closed-circuit television procedure was carried out with great difficulty. Mrs. Craig expressed

concern from the outset about her ability to speak with her counsel (J.A. 73-74). She had taught these children, knew them well, and had special knowledge of each child's intellectual and moral capabilities and, therefore, could have greatly assisted her counsel during the competency evaluation and the cross-examination of each child, as well as during the section 9-102 hearing.

The video camera technician was in the judge's chambers along with the prosecutor, defense counsel, and a court clerk (J.A. 89). Mrs. Craig, one additional defense counsel, one additional prosecutor, the judge, and the jury were in the courtroom viewing the image of the child fact witness on two nineteen-inch television monitors. The only image projected through the monitors was that of the child fact witness (J.A. 89). Although the audio portion of the projection included the questioning and comments by the prosecutor and defense counsel, their physical images were not projected.

The only means of communication between Mrs. Craig and her defense counsel, who was in chambers with the child, was by means of an open phone line to the defense table, where Mrs. Craig and second chair defense counsel were seated in the courtroom. Although there was initially some confusion about whether a button needed to be pushed to "open" the phone line (J.A. 86), the line was actually continuously open.

Neither the mechanics of the procedure nor the phone line was tested or practiced with the defendant or defense counsel prior to its use at trial. The phone receiver was laid on the table next to defense counsel, who was seated out of camera view in the judge's chambers. Mrs. Craig, seated in the jury's view in the courtroom, sat with the phone receiver to her ear. Thus, she had to speak loudly enough for defense counsel to hear her through the open receiver laying on the table, while his attention was directed at the child fact witness and the prosecutor. Although a microphone was placed on the desk in front of the chair where each child witness was seated, there was no mechanism to ensure that the child spoke directly into the microphone or maintained an even tone of voice. Mrs. Craig complained of her difficulty in hearing what the child was saying (J.A. 81).

The mechanics also required that the sound plug, but not the video plug, be "pulled" every time anyone registered an objection (J.A. 83). Notwithstanding the making of an objection, the two video monitors would continue to "project" the child's active image to the jury. Counsel in chambers with the child would exit the chambers and then enter the courtroom through a hallway to confer with the judge at the bench, in view of the jury.

During the competency voir dire of Brooke Etze, Mrs. Craig was unable to reach defense counsel on the phone, despite numerous attempts (J.A. 86). The court repeatedly acknowledged the technical difficulties with the phone communication between Mrs. Craig and her counsel, and with the process of coordinating objections and their resolution (J.A. 85-87). The court was also concerned with the continued projection of the child's image on the monitor, which the jury could view while counsel were at the bench. Concerned that the audio was still projecting into the courtroom while objections were being resolved (J.A. 137), the trial judge directed that the technician "should pull a plug or something for the time being" (J.A. 138).

The problem with the phone communication continued throughout the entire direct cross-examination of Brooke Etze (J.A. 139). Only after defense counsel completed cross-examination, and after commencement of the prosecutor's redirect, was Mrs. Craig finally, through the intervention of the judge, able to reach defense counsel in chambers. The judge observed and heard that Mrs. Craig had been frantically trying to reach counsel to insist upon a certain line of cross-examination of Brooke (J.A. 141-59).[4]

Mrs. Craig's motion for new trial was denied on August 25, 1987. When *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), was decided on September 10, 1987, Mrs. Craig renewed her motion for new trial. She argued a failure of all three *Wildermuth* standards: (1) that ordinarily the trial judge

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[4] Counsel of record in this Court was trial counsel in the trial of Jamal Craig, in July 1987, before the same judge, in the same courtroom, with the same prosecutors, in which the same procedure was utilized.

should question and observe the child, in the defendant's presence; (2) that more than expert testimony should be required; and (3) that the evidence should be specifically focused on the impact to the child of testifying in the defendant's presence. The trial court again denied her motion. On September 21, 1987, Mrs. Craig was sentenced to concurrent terms of ten years and noted her appeal. This Court's decision in *Coy* v. *Iowa* was issued on June 29, 1988, after oral argument in the Court of Special Appeals of Maryland. Mrs. Craig filed a motion for reargument in light of *Coy*, which was denied. Her conviction was upheld by the Court of Special Appeals of Maryland on August 3, 1988 (Pet. App. 22a-69a). The Court of Appeals of Maryland granted certiorari. On July 24, 1989, the court unanimously reversed Mrs. Craig's conviction, holding that the requirements of section 9-102 had not been met (Pet. App. 1A).

SUMMARY OF ARGUMENT

The sixth amendment right to face-to-face confrontation with fact witnesses is fundamental. Only upon a showing of inherent reliability and unavailability, such as long-recognized hearsay exceptions, has the Court fashioned an exception to this otherwise absolute right. A child fact witness does not possess such inherent reliability and has historically been required to give live, in-court, face-to-face testimony.

This Court has long recognized the preference for live, in-court testimony by fact witnesses in the presence of the defendant. The integrity of the factfinding process requires that facts, and fact witnesses, be evaluated by a factfinder after exploitation by adversaries. Heretofore, the attorney adversary confronted the witnesses and cross-examined the testimony, and the factfinding process intentionally involved the interplay and dynamics of the entire courtroom—its players and its process.

Social scientists and child abuse experts recognize that child fact witnesses are highly susceptible to pretrial and trial influences. Prior to child protective statutes, child fact witnesses submitted to the same scrutiny as all other witnesses and it

was the role of the factfinder to determine the credibility of the child fact witness as the factfinder would any other witness.

The State argues that there is a compelling state interest that outweighs the defendant's constitutional right to live, in-court testimony, subject to face-to-face confrontation. However, the statute is arbitrary and underinclusive, in that it does not protect all child victims and it does not deny face-to-face confrontation to all adult predators. Moreover, it fails to employ the least restrictive alternative. The extraordinary process of one-way closed-circuit televised testimony also impacts the right to communicate with counsel and the right to have the factfinder determine the credibility of the witnesses.

In *Coy* v. *Iowa*, this Court found that any intrusion into the protected territory of the constitutional right to face-to-face confrontation would require—at a minimum—an individualized finding that a child fact witness needs special protection from testifying in the presence of the defendant. No such determination was made by the trial court in the instant case, and the statute is unconstitutional as applied.

Finally, the Court of Appeals of Maryland relied solely upon statutory construction of a Maryland state statute—independent and adequate state grounds—in deciding this case below. In short, the court found that the trial judge failed to personally question and observe the child fact witness, as required by the Maryland statute.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT TO FACE-TO-FACE CONFRONTATION, IN ALL CIRCUMSTANCES IN WHICH THE EVIDENCE DOES NOT POSSESS INHERENT RELIABILITY, IS ABSOLUTE, BECAUSE THE INTEGRITY OF THE FACTFINDING PROCESS REQUIRES THAT THE TESTIMONY OF FACT WITNESSES, PARTICULARLY CHILD WITNESSES HIGHLY SUSCEPTIBLE TO INFLUENCE, BE SUBJECTED TO LIVE, FACE-TO-FACE CONFRONTATION, IN A FORMAL COURTROOM SETTING, IN THE PRESENCE OF THE DEFENDANT, THE JUDGE, AND THE FACTFINDER.

In *Coy* v. *Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 2803 (1988), this Court left open the issue of whether the sixth amendment right to confrontation is absolute.

A. The Only Exceptions To The Right To Confrontation That Have Been Permitted By This Court Are Those Long-Recognized Exceptions To The Rule Against Hearsay, Affording The Inherent Reliability Necessary To Satisfy The Goal Of The Sixth Amendment.

Confrontation is the "greatest legal engine ever invented for the discovery of truth." *Kentucky* v. *Stincer*, 482 U.S. 730, 736 (1987). Although this Court has never had occasion to determine whether the right to "face-to-face" confrontation is absolute, the Court has addressed the issue of what, if any, limitations the sixth amendment places upon the use of hearsay. This Court has held that the right to confrontation is violated by the use of hearsay unless the defendant is unavailable and the testimony is reliable. *Ohio* v. *Roberts*, 448 U.S. 56, 65-67 (1980). The reliability must rise to the same level of trustworthiness that would accompany the testimony if it were fully subjected to the exercise of the right to confrontation. *Id.* at 65. Accordingly, this Court has held that exceptions to the rule against hearsay satisfy the right to confrontation only when they are "firmly . . . rooted in our jurisprudence." *Bourjaily* v. *United States*, 483 U.S. 171, 183 (1987).

The Court has employed language, which when read in isolation, appears to offer "exceptions" or "limitations" on the right to confrontation. However, this has only been applied to testimony that comes within these long-recognized "inherent reliability" exceptions, which need no confrontation to satisfy the sixth amendment's goal. For all other testimony, nothing less than an absolute right to live, in-court, face-to-face confrontation and cross-examination, in the presence of the defendant, is sufficient to satisfy the right to confrontation.

In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), Justice Blackmun stated:

> [T]he absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'"
>
> The Court, however, has recognized that competing interests, if "closely examined," may warrant dispensing with confrontation at trial. . . .
>
> . . .

> [I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. . . .
>
> Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule.". . .
>
> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection.". . .
>
> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.*

Id. at 64-66 (emphasis added) (citations and footnotes omitted). In *California* v. *Green*, 399 U.S. 149 (1970), Justice White, discussing the rationale behind the sixth amendment, stated:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of . . . denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . .
>
> . . .
>
> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause:
>
> "The primary object of the constitutional provision in question was . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Id. at 156-58.

Thus, confrontation is absolute unless there is a showing of the same degree of trustworthiness that the process envisioned by the confrontation clause was designed to produce.

Neither *Coy* nor the instant case present a firmly rooted exception to the rule against hearsay. The reason that the State denies face-to-face confrontation is not because of the inherent reliability of the testimony of the child fact witness but rather because of the proffered interest "in ensuring that the children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence." Petitioner's Brief at 24. Thus, the testimony of the child fact witness in both *Coy* and the instant case comes within the vast majority of fact witness testimony, lacking in inherent reliability and therefore subject to the process mandated by the confrontation clause for examining credibility.

This Court has never ruled that the right to face-to-face confrontation is less than absolute, and the language that the Court has used in prior decisions indicates that it would not so rule. In *Coy*, Justice Scalia, writing for the Court, stated:

> [T]he right "to be confronted with the witnesses against him . . . comes to us on faded parchment," with a lineage that traces back to the beginnings of Western legal culture. . . .
>
> Most of this Court's encounters with the Confrontation Clause have involved [exceptions to the rule against hearsay]. The reason for that is . . . that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, . . . "[s]imply as a matter of English" *it confers at least "a right to meet face to face all those who appear and give evidence at trial."*. . .
>
> *We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact* . . . . [The clause is] intended "to secure the accused the right to be tried . . . by only such witnesses as meet him face to face at the trial, who give their testimony in his presence . . . [W]e have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause.". . .
>
> *[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution."*. . .
>
> A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts . . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly.". . .
>
> . . .
>
> It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause . . . the irreducible literal meaning of the clause: "a right to *meet face to face* all those who appear and give evidence *at trial*."

Coy, 487 U.S. at ____, 108 S.Ct. at 2800-03 (citations omitted) (most emphasis added; some emphasis in *Coy*).

Concurring in *Coy*, Justice O'Connor took the position that rights under the confrontation clause are not absolute. However, even the statement that "our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses[,]" *id.* at ____, 108 S. Ct. at 2805, is based upon the fact that "the Court has time and again stated that the Clause 'reflects a *preference* for face-to-face confrontation at trial,' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* at ____, 108 S. Ct. at 2804 (citations omitted) (emphasis in *Coy*). However, in all of this Court's prior holdings on which Justice O'Connor relies, the "competing interests" were the need for relevant and material evidence for which live testimony was unavailable and the evidence possessed the inherent reliability found within, and demanded by, a firmly rooted hearsay exception.

B. The Integrity Of The Factfinding Process Requires Face-To-Face Confrontation, Because Requiring An Accuser To State The Accusation In The Live Presence Of The Accused Profoundly Impacts Upon The Search For Truth.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), the Court contrasted the prophylactic nature of fourth amendment protections with:

> those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.

Id. at 241. The integrity of the factfinding process is the adversary system's ultimate "quality control" mechanism. When the system possesses the requisite integrity in its guilt-innocence determination process, it enjoys the highest possible assurance of both "the accuracy of the factfinding" and the elimination of "the clear danger of convicting the innocent." *Brown* v. *Louisiana*, 447 U.S. 323, 329 n.6 (1980).

This Court has recognized that certain aspects of the fifth, sixth, and fourteenth amendments were designed by the framers to ensure the integrity of the factfinding process. *E.g.*, *Taylor* v. *Illinois*, 484 U.S. 400 (1988) (right to compulsory process); *Vasquez* v. *Hillery*, 474 U.S. 254, 260-64 (1986) (cannot be indicted by a grand jury not composed of a fair cross-section); *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (right to trial by jury not satisfied by a nonunanimous, six-person jury verdict); *Kaufman* v. *United States*, 394 U.S. 217, 224 (1969) (privilege against compelled self-incrimination); *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965) (retroactive application of a right that goes to the integrity of the factfinding process); *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965) (right to an impartial jury); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel).

No component of the adjudicatory process has received a greater endorsement from this Court, concerning its contribution to this integrity, than the right to confrontation. *E.g.*, *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987) ("a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980) ("means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate 'integrity of the fact-finding process.'"); *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965) ("[E]ssential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

Whenever there is conflicting testimony, the factfinding process turns upon the credibility of the fact witnesses. Face-to-face confrontation is the only constitutionally approved method for evaluating fact witnesses as to their veracity, truthfulness, credibility, and integrity. As this Court has recognized, there is a profound effect upon a witness standing in the presence of the person accused by that witness. *Coy* v. *Iowa*, 108 S. Ct. at 2802. The factfinder's decision to believe or disbelieve a fact witness is based upon the sum of the (1) content of the testimony, (2) overall demeanor of the witness, (3) reaction of the defendant to the witness, (4) reaction of the witness to the defendant, (5) interplay between the questioning attorney and the witness, and (6) the interplay, if any, between the judge and the witness, e.g., a question or an admonition from the judge to the witness.

1. The Integrity Of The Factfinding Process Requires Face-To-Face Confrontation To The Same Degree, Not Less, When The Fact Witness Is A Child Witness, Who Is Highly Susceptible To Pretrial And Trial Influences.

The integrity of the factfinding process requires face-to-face confrontation to the same degree, not less, in a case in which the fact witness is highly susceptible to pretrial influences. In a child abuse case, pretrial influences are visited upon the suspected child abuse victim by (1) examining and treating physicians who must report suspected child abuse, (2) investigating law enforcement officers engaged in the often competitive business of ferreting out crime, (3) social workers concerned with the welfare of suspected child abuse victims, (4) parents, family, and friends supportive of suspected child abuse victims, (5) treating child psychotherapists and licensed social workers, (6) prosecutors and victim/witness assistance personnel preparing fact witnesses for trial, and (7) malevolent adults. A number of social scientists, psychologists, psychiatrists, and attorneys have recorded these various phenomena in scientific studies and other literature in the study of child abuse.

Social scientists have determined a number of situations in which false disclosures of child abuse occur.[5] Studies demonstrate the importance of avoiding suggestion to impressionable children. Terr, *The Child Psychiatrist and the Child Witness: Traveling Companions by Necessity, if Not by Design*, 25 J. Am. Acad. Child Psych. 462 (1986). "Leading questions . . . distort the stories that children eventually tell." *Id.* at 469.[6]

Much has also been written about the use of so-called "anatomically correct dolls" by social workers. *See, e.g.*, Herzog, *Child Sexual Abuse Defense: Pretrial Investigation, Experts, and Proxy Testimony* (pts. 1, 2 & 3), The Champion, Nov. 1986, at 6, The Champion, Dec. 1986, at 9, The Champion, Jan.-Feb. 1987, at 10, 11-12; McIver, Wakefield & Underwager, *Behavior*

[5] These include: (1) medical problems that give rise to increased sexual concerns or misdiagnosed physical findings, e.g., nonspecific vulvovaginitis, anal fissures caused by constipation, skin lesions misdiagnosed as herpes; (2) a child "brainwashed" by a vindictive parent, usually the mother, who fabricates incest to punish the spouse by excluding him from further contact with the child; (3) a child influenced by a delusional mother who projects her own unconscious sexual fantasies onto the spouse; (4) a child whose allegations of sexual abuse are based upon sexual fantasies rather than reality; (5) a child falsely accusing the father of incest for revenge or retaliation; (6) false allegations of sexual abuse initiated by third parties, e.g., hypervigilant parents of preschool children who have been oversensitized by sensational media coverage of sexual abuse scandals at nursery schools and day care centers; and (7) false testimony of children in preschool and day care settings, e.g., the Jordan, Minnesota case. D. Schetky & A. Green, *Child Sexual Abuse: A Handbook for Health Care and Legal Professionals* 104-23 (1988).

[6] The author describes the "flamingly suggestive" letter sent by a police department to the parents of children who had attended a day care center. The letter described an on-going criminal investigation with a named suspect under arrest, as well as acts of oral sex possibly committed under the pretense of taking the child's temperature, plus nude photography. The letter sought information about whether the recipient's children had ever observed the accused leaving a classroom alone with a child during any nap period or tying up a child. *Id.* at 466.

of Abused and Non-Abused Children in Interviews with Anatomically Correct Dolls, 1 Issues in Child Abuse Accusations 39 (1989). Many child abuse experts argue that the dolls are not anatomically correct, and are more appropriately labelled "anatomically *incorrect*." *See* Herzog (pt. 2), *supra* at 13; *see also id.* (pt. 3), text accompanying no[illegible]s 76-82. Dolls can taint the child's ability to recall events ac[illegible]rately. "The use of the dolls can provide a modeling effect. The social learning literature shows that one of the most powerful ways of teaching children is modeling." Underwager & Wakefield, *Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist*, The Champion, Jan.-Feb. 1987, at 17. Like police officers, "trained behavioral scientists may themselves slip into the suggestive mode." Terr, *supra* at 469.

For emotional reasons, many children are unable to challenge the perceptions of events by parents and other adult caretakers, even when such perceptions are incorrect and differ from that of the child.

> Young children are taught to believe their parents and regard them as authority figures. Given the young child's emotional and physical dependency on her parents and wish to please them, it may be exceedingly difficult for her to challenge her parents' perception of events when they differ from her own.

Schetky & Green, *supra* at 175.

Treating child psychotherapists are not in agreement about the best method of eliciting evidence from sexual abuse victims. A professor of clinical psychiatry has queried whether closed-circuit television is "worth all this fuss." Terr, *supra* at 469. "It will, perhaps, lull courts into thinking that sexually abused children will automatically tell the truth on television . . . ." Dr. Terr believes that in certain instances it is helpful for the child to "stand up" in court and "take societally approved revenge on the person who harmed him." *Id.*

One of the most notorious cases of hysterical reaction to allegations of child abuse occurred in Jordan, Minnesota.

> [A]llegations arose regarding crimes committed against children, ranging from gross sexual abuse to murder. Twenty-four people were accused: one pled guilty, two

were acquitted, and the charges were dismissed against twenty-one others. . . .

The investigation of the allegations was then picked up by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, acting jointly. On February 12, 1985, the Minnesota Attorney General's Office issued "The Report on Scott County Investigations," which detailed the results of this joint investigation. The Report serves as a tragic example of the manner in which an investigation of child sexual abuse can go awry. . . .

The Report found that no credible evidence existed for the multifarious allegations lodged against the residents of Jordan [Minnesota]. . . .

The Report made specific findings regarding the use of repetitive questioning techniques, recognizing that repeated interviews seriously undermined the reliability of any subsequent testimony. One child was interviewed nine times before the joint investigation began; another child endured at least thirty interviews in the course of the original investigation. The Report also cited examples of separating children, who steadfastly refused to admit that any abuse took place, from their parents for several months. These children were repeatedly interrogated by their foster parents about the alleged abuse. There were even examples where the children were told that their reunion with their parents would be fostered by "admissions" of their parents' abuse. The Report found that there was a permeating lack of recording or documentation of the interviews. The Report recognized that recording is necessary to determine the consistency of the child's statements. The Report also condemned the "cross-germination" effect that occurred when the authorities informed interviewees of allegations made by others and conducted joint interviews.

The Report concluded that no evidence existed for the majority of the accusations and that the careless manner of the investigation not only ruined the prospects for the successful prosecution of any valid cases, but may have "created" invalid cases as well.

Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 Am. J. Crim. L. 227, 239-40 (1987) (footnotes omitted).

Pretrial influence in a child abuse case naturally runs from the adult to the child. The child's relative immaturity, inexperience, and inability to articulate fine distinctions of fact may confound the search for truth and confuse fact from fiction. Courts have long recognized that a child's power to recollect can be lost through an interviewing process that is repetitive and suggestive. In *People* v. *Delaney*, 52 Cal. App. 765, 199 P. 896 (1921), the court stated:

> The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood. . . . But without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in any actually existing fact.

Id. at 774, 199 P. at 900.

This is consonant with the understanding of experts of the process of memory. Studies of children's memories suggest that new information accrued from conversation, questions, or other sources "can do more than simply supplement in recollection: it can occasionally alter, or transform, a recollection." Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Soc. Issues 51 (1984). Such distortion is especially likely to occur when "the witness has high regard for the examiner or wants to please her." Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. Pitt. L. Rev. 547, 553 (1984).

The suggestibility inherent in the individual and collective dynamics of communication with physicians, police officers, social workers, parents, psychotherapists, prosecutors, and malevolent adults, needs face-to-face confrontation and cross-examination in the adversary process. Most, or all, of these pretrial encounters are not preserved for review by the fact-finder. Because an alleged child abuse victim has been exposed to more pretrial influences than an adult fact witness, and because of age and immaturity, there is at least as great a need for the full complement of the sixth amendment right to confrontation.

By contrast, the Maryland statute, instead of subjecting the testimony of the child fact witness to equal scrutiny, permits a

diluted testing. Under the statute, the adversary process itself is designed to replicate the child's initial encounters and interviews—intentionally nurturing and nonthreatening. The child fact witness never encounters a judge, jury, courtroom, or the accused. As such, the factfinding process possesses some of the same indicia of unreliability as the unsworn, out-of-court, pretrial responses to the well-intended, but typically leading, interviews.

2. The Integrity Of The Factfinding Process Requires That Live Testimony Be Received In The Presence Of The Factfinder And The Judge In A Formal Courtroom Setting.

The testimony of a fact witness must also be taken in the live presence of a judicial officer and the formality of a courtroom. The dignity of judicial proceedings requires that the "umpire of the contest" be present for all portions and all aspects. *State* v. *McIver*, 238 S.C. 401, 405, 120 S.E.2d 393, 397 (1961). "This direction and control must continue during the entire trial, and pervade every part . . . ." *Bateson* v. *State*, 46 Tex. Crim. 34, 42, 80 S.W. 88, 91 (1904), *rev'd on other grounds sub. nom. Clark* v. *State*, 56 Tex. 293, 120 S.W. 179 (1909). This requires the judge to be present in person, *Ridenour* v. *State*, 94 Okla. Crim. 92, 102, 231 P.2d 395, 405 (1951), and to be able to see everything that transpires during the judicial proceeding. *Bateson*, 45 Tex. Crim. at 44, 80 S.W. at 92. It is not enough that the judge hears. *People* v. *Chrfrikas*, 295 Ill. 222, 228, 129 N.E. 73, 75 (1920). The judge must "be visibly present every moment of [all criminal trials], so that [the judge] can always see and hear all that is being done. . . ." *Thomas* v. *State*, 150 Ala. 31, 47, 43 So. 371, 377 (1907). Otherwise, the judge will not be able to see facial expressions and cannot "check the abuses . . . and to interpose and restrain counsel. . . ." *Ridenour*, 94 Okla. Crim. at 103, 231 P.2d at 406; *see Bateson*, 46 Tex. Crim. at 40, 80 S.W. at 89 ("no opportunity afforded defendant by his counsel to have it stopped").

Additionally, the process requires the witness to face the factfinder, and the factfinder to evaluate, as a whole, all that transpires, employing simultaneously the senses of sight and

sound. The confrontation clause includes the right "of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Kentucky* v. *Stincer*, 482 U.S. 730, 736-37 (1987). The Court in *Stincer* noted that an additional advantage of the confrontation clause is that "the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying." *Id.* at 737 n.8. Testing the credibility of a witness entails not just observation of facial expressions, it includes observation of the body movement of the witness, which requires the physical presence of the witness before the factfinder. *Lewison* v. *Crews*, 28 A.D.2d 111, 113, 282 N.Y.S.2d 83, 85-86 (1967). Moreover, the factfinder, like the judge, needs to be able to "watch the facial expressions of the attorneys asking questions, . . ." *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1242 (E.D. Ark. 1978).

Not only are child fact witnesses particularly susceptible to influence during the pretrial period, they are also highly susceptible to influence during the trial itself. The nod of approval or look of consternation from the prosecutor can easily influence the testimony of a child witness. Child fact witnesses should testify in both the immediate presence of a judicial referee and the immediate presence of the factfinder, and the testimony of the child witness should stand the same degree of scrutiny as the testimony of all other witnesses.

The one-way closed-circuit television procedure in the Maryland statute is designed to shield the child fact witness from the accused. Whatever its design, the procedure removes the child fact witness from the formality of the court proceeding, and the child appears before neither a judicial referee nor the factfinder.

In addition, the medium of television itself raises questions "concerning the child's demeanor when the camera, with its obvious limitation, becomes the juror's eyes and ears." Ritsema, *Testimony of Children via Closed Circuit Television in Indiana: Face (to Television) to Face Confrontation*, 23 Valparaiso U.L. Rev. 455, 463 (1989). As Justice Cardoza stated in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934): "It is common

knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality." *Id.* at 115. Moreover,

> the lens or camera angle may make the witness look small and weak or large and strong, or the camera may fail to carry the subtle nuances of the witness, including changes in the child's demeanor. The child's credibility may also be subconsciously enhanced by the television as often the media gives an aura of credibility and authority to those it portrays.

23 Valparaiso U.L. Rev. at 418. The television procedure thus precludes the finders of fact from seeing all that they could see and should see in an ordinary courtroom setting. "Television justice," in which the child fact witness testifies in a vacuum, via a medium most closely associated in a child's mind with wonder, fantasy, magic and "make believe," cannot help but affect the integrity of the child's testimony.

There is no empirical data, history, or constitutional analysis for the factfinding process employed under the Maryland statute. It is left for this Court's speculation as to the extent of difference for the factfinder between the telegraphic image of the witness over a closed-circuit television system and the live, face-to-face presence of the witness under the system utilized since our adversary process began. What is known is that a judicial officer cannot protect the factfinding process from intended and unintended influence by prosecutors and defense attorneys and the factfinder cannot observe the demeanor of the witness, nor the interplay between the attorneys and witnesses. The integrity of the fact finding process in a child abuse case demands the same face-to-face confrontation as any other criminal adjudication.

C. The Right To Face-To-Face Confrontation Is Absolute Because, Like The Right To "Conflict-Free" Counsel, It Is What Does Not Take Place In Its Absence That Destroys The Integrity Of The Factfinding Process.

The role of counsel in a criminal case is "to ensure that the adversarial process works to produce a just result . . ." *Burger v. Kemp*, 483 U.S. 776, 788 (1987). Thus, like the right to face-to-face confrontation, the right to counsel is one of those

aspects of the adjudicatory process that is integral to the integrity of the factfinding process.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), because of a conflict arising from multiple representation, three co-defendants moved for appointment of separate counsel, which was denied. In finding a denial of the sixth amendment right to "conflict-free" counsel, this Court recognized that "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing." *Id.* at 90 (emphasis in original). "Because the conflict primarily compels the lawyer *not* to pursue certain arguments or take certain actions, it is all the more difficult to discern its effect." *Burger v. Kemp*, 483 U.S. 776, 800 (1987) (Blackmun, J., dissenting).

Even if the right is not otherwise absolute, the Court should determine that the right is absolute when considering (1) the near-absolute, fundamental nature of the right, (2) the harm that comes not from what is done but from what is not done, i.e., the absence of face-to-face confrontation as a truth tester, and (3) the fact that it is almost impossible to discern errors that result from omissions, as opposed to commission.

Further analogy can be seen in this Court's discussion in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In resolving the waiver standard under the fourth amendment, the Court noted:

> There is a vast difference between those rights that protect a fair criminal trial . . . than the rights guaranteed under the Fourth Amendment. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted. . . . [W]ith everything to be gained by the presence of counsel and no interest deserving consideration to be lost, an inflexible rule serves well.

Id. at 241, 242-43 n.30. This Court should recognize the need for, and adopt, an inflexible rule of right to face-to-face confrontation in all situations not coming within a long-recognized exception to the rule against hearsay.

II. EVEN IF THE RIGHT TO FACE-TO-FACE CONFRONTATION IS NOT ABSOLUTE, THE MARYLAND STATUTE IS UNCONSTITUTIONAL, BECAUSE EITHER THE STATE LACKS A COMPELLING STATE INTEREST IN TELEVISED TESTIMONY, TAKEN OUTSIDE OF THE COURTROOM, AND NOT IN THE LIVE PRESENCE OF THE DEFENDANT, THE FACTFINDER, AND THE JUDGE, OR THE DEFENDANT'S RIGHT TO FACE-TO-FACE CONFRONTATION OUTWEIGHS SUCH INTEREST, PARTICULARLY WHEN CONSIDERING THE STATUTE'S UNCONSTITUTIONAL IMPACT ON THE SIXTH AMENDMENT RIGHTS TO COUNSEL AND TRIAL BY JURY.

The State's efforts in protecting child victims and prosecuting adult predators is commendable. However, the legislature, in responding to this emotional touchstone, enacted an underinclusive and arbitrary legislative classification, verifying the State's lack of a compelling interest in its legislative formulation. Even if there is a compelling interest in the statute, this interest cannot outweigh the fundamental right to face-to-face confrontation necessary to ensure the integrity of the factfinding process. This is particularly true in light of the numerous alternatives, each less intrusive upon the fundamental right to face-to-face confrontation, which the State could have employed to serve its interest. Moreover, the balancing process must take into account that the denial of face-to-face confrontation, in turn, unconstitutionally impacts the defendant's sixth amendment rights to counsel and trial by jury.

A. Maryland's Statutory Scheme Is So Underinclusive And Arbitrary In Its Scope That The State Has Either Failed To Demonstrate A Compelling Interest Or Has Enacted Legislation Incapable Of Satisfying Its Interests.

In order to enact a constitutional statute that negatively impacts, infringes upon, or distributes unequally the right to confrontation, there must exist a compelling state interest in the legislative classification. *See Coy* v. *Iowa*, 487 U.S. 1012, ____, 108 S.Ct. 2798, 2805 (1988) (O'Connor, J., concurring); *see generally* L. Tribe, *American Constitutional Law* § 16-7 (2d ed. 1988). The State proffers two compelling state interests. The first is "ensuring that children be shielded from the further

torment associated with testifying in an open courtroom in the defendant's presence." Petitioner's Brief at 24.

The State certainly has a compelling interest in protecting all child victims of crimes of violence and crimes of sexual abuse. Moreover, the State's interest in protecting child victims is an interest that it has on behalf of all child victims of crimes of violence and crimes of sexual abuse, regardless of whether these crimes are perpetrated by a guardian or nonguardian of the victim.

Nevertheless, the legislature enacted section 9-102 to apply only to a limited group of victims, defendants, and offenses. The victim must be a minor child under 18 years of age. Md. Ann. Code art. 27, § 35A (1987). The defendant must be a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of the minor child. *Id.*; Md. Fam. Law Code Ann. § 5-701 (Supp. 1989); *see Pope* v. *State*, 284 Md. 309, 396 A.2d 1054 (1979) (a person in loco parentis). The offense must be child abuse, which in its sexual abuse formulation includes incest, rape, sexual offense, sodomy, and unnatural and perverted sexual practice. *See Wildermuth* v. *State*, 310 Md. 496, 526-27, 530 A. Md. 275, 290-91 (1987).

Thus, the statute only applies for victims of physical abuse or sexual abuse who happen to be part of a parental or in loco parentis relationship with their adult predator at the time of the crime. Because of the limited scope of the statute, other child victims, even though subjected to the identical acts of violence and acts of sexual abuse, do not come within the statute if, at the time of the offense, their assailants are nonguardians. There cannot reasonably exist a compelling governmental interest in shielding child victims of crimes perpetrated by guardians, while "subjecting to further torment" child victims of crimes perpetrated by nonguardians.

In fact, the legislature has provided the protection of section 9-102 to child victims of less severe crimes, while completely denying such protection to child victims of more severe crimes. Maryland deems the nonguardian criminality more culpable, as evidenced by the higher penalties provided for crimes of violence and crimes of sexual abuse when committed by non-

guardians. Physical injury to a child victim by a nonguardian can result in a penalty of at least twenty years imprisonment, and possibly life imprisonment. *Roberts* v. *Warden*, 242 Md. 459, 219 A.2d 254 (1965), *cert. denied*, 385 U.S. 876 (1966). However, physical injury to a child victim by a guardian results in a maximum penalty of only fifteen years. Md. Ann. Code art. 27, § 35A (1987). Similarly, sexual abuse of a child victim by a nonguardian can result in a penalty of twenty years imprisonment, if unaggravated, and life imprisonment, if aggravated. *Id.* §§ 461-464A. However, sexual abuse of a child victim, whether aggravated or unaggravated, by a guardian results in a maximum penalty of only fifteen years. *Id.* § 35A.

This Court has held that a legislative classification may become unconstitutional through its underinclusiveness. In *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), the Court found "wholly arbitrary" a statute under which "those held in jail awaiting trial in a county other than their residence are . . . permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reason in the county of their residence are completely denied the ballot." *Id.* at 530.

If such underinclusiveness is sufficient to render a statute unconstitutional, it is certainly sufficient to at least preclude the State from demonstrating that it has a compelling governmental interest in such underinclusiveness. If the State's interest in "ensuring that children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence" were truly compelling, the State would surely have provided the same protection for the child victims of the same acts when committed by nonguardian predators that it does when the acts are committed by guardian predators.

The State's second proffered compelling interest is that of "seeing that those who prey upon children are brought to justice." Petitioner's Brief at 24. The framers certainly believed that the people, through their government, have a compelling interest in a system of criminal justice. As integral parts of this system, the framers recognized search and arrest in the fourth amendment, criminal prosecution in the sixth amendment, and punishment of crime in the eighth amend-

ment. The framers also recognized a compelling governmental interest in a fundamentally fair system of criminal justice. As integral parts of this fairness, the framers mandated that those accused of crime not be subjected to (1) unreasonable search and arrest, U.S. Const. amend. IV, (2) unfair prosecution, *id.* amend. VI, or (3) cruel and unusual punishment. *Id.* amend. VIII.

The Maryland statute affects the constitutional guarantee of right to confrontation by providing less face-to-face confrontation for guardians accused of crimes of violence and crimes of sexual abuse than it does for nonguardians accused of crimes of violence and crimes of sexual abuse. "[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-13 (1949).

By analogy, child abuse is a crime that is foremost in the public concern, and the legislature has naturally responded. However, the child victim of an act of violence or an act of sexual abuse is no less harmed by the heinous conduct, and the child victim is no less tormented by having to testify, when the crime is committed by someone who is not, at that moment, within the guardian status necessary for the child abuse statute. Nonetheless, the legislature, in its response to this politically sensitive issue, protected one group of child victims, while totally ignoring the same issue for similarly situated child victims. The net effect has been to produce legislation that denies the right to face-to-face confrontation to some defendants, while affording that fundamental right to others. *See Smith* v. *Cahoon*, 283 U.S. 553, 567 (1931) ("not . . . the slightest justification" for an agricultural exemption from a statute "designed to safeguard the public with respect to the use of the highways"). Because the statute affords differing degrees of constitutional protection, there cannot reasonably exist a compelling governmental interest.

B. Even If The State Has A Compelling Interest, The Defendant's Right To Face-To-Face Confrontation Outweighs Such Interest, Particularly When Considering Both The Near-Absolute Nature Of The Right And The Statute's Failure To Employ The Least Restrictive Alternative.

If the Constitution did not require a balancing of the State's interest and the rights of defendants, then all child abuse victims could be shielded from further torment, whatever its source, and all those who prey upon children could be brought to justice, whatever its price. However, the framers of the Constitution expressly provided rights, privileges, and protections for those accused of crime. Moreover, in establishing our unique form of government, the framers themselves accomplished the balancing that is needed, if any. The framers weighed the competing interests of the accused and society and, in response, established the constitutional balance we enjoy in the form of the Bill of Rights. Then, as now, the world was not a world of only truthful accusation. In response to this reality, the framers created the sixth amendment right to face-to-face confrontation as the only permissible method of balancing the rights of the accused and the accuser.

The purpose of live, face-to-face confrontation in the presence of a judge, factfinder, and the accused is to test the truth of the accusation. This process of live, face-to-face confrontation in the courtroom is the history lesson of centuries, which has consistently been recognized by this Court. The State's method of televised, out-of-court testimony in the absence of the judge, the factfinder, and the accused is untested; it is without precedent; it is outside of our common jurisprudential experience. This Court has no reason to believe that its product is truth.

Even if the State could prevail "on balance," when weighing a compelling interest against the least restrictive imposition on the defendant's right to face-to-face confrontation, the State cannot prevail "on balance" when its approach is far shy of employing the least restrictive alternative, particularly when lesser restrictive alternatives could easily have been accomplished.

Last term, in *Sable Communications of California, Inc.* v. *FCC*, 109 S.Ct. 2829 (1989), Justice White, writing for a unanimous Court, stated that the government could regulate the exercise of a fundamental right "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* at 2836. Even though the Court found a compelling interest, the government's position could not prevail, because "to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with [fundamental rights].' . . . It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

In the instant case below, the Court of Appeals of Maryland found that the statutory procedure of one-way closed-circuit television constituted the greatest degree of intrusion upon the right to face-to-face confrontation. "It is, rather the ultimate—the fartherest a court can go in that direction." *Craig* v. *State*, 316 Md. 551, 567, 560 A.2d 1120, 1128 (1989). The court also found that the "appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. . . . Thus, for example, if a child witness will not suffer 'severe emotional distress' when testifying via two-way television in a room separate from the courtroom, so the accused is visible to the witness as well as visa versa, that procedure should be followed." *Id.* Only after the court determines that "*neither two-way television nor any other device* short of that authorized by § 9-102 will enable the witness to testify, [may it] then turn to that section." *Id.* at 568, 560 A.2d at 1128 (emphasis added). The court of appeals found that the trial judge "*did not explore any alternatives* to the use of one-way closed-circuit television." *Id.* (emphasis added).

C. Even If The State's Interest Outweighs The Defendant's Right To Face-To-Face Confrontation When Considered Alone, It Does Not Outweigh When Considering The Unconstitutional Impact Of The Statute Upon The Sixth Amendment Rights To Counsel And Trial By Jury.

The Maryland statute cannot be invoked if the defendant elects self-representation but can be invoked if the defendant elects the sixth amendment right to counsel. Consequently,

the statute forces the defendant to choose between the sixth amendment right to counsel and the sixth amendment right to face-to-face confrontation.

Forcing the defendant to choose among constitutional rights is impermissible. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). If the defendant chooses to face her accuser, she must necessarily forego her right to be represented by an attorney and must represent herself. If she elects her constitutionally protected right to counsel, she can be denied face-to-face confrontation. In preserving face-to-face confrontation only if a defendant elects self-representation, the statute has an unconstitutional chilling effect upon the exercise of the right to counsel.

The statute also denies effective assistance of counsel. Except when the defendant is testifying as a witness, the defendant has a "right to *unrestricted access* to his lawyer for advice . . ." *Perry* v. *Leeke*, 109 S. Ct. 594, 602 (1989) (emphasis added); *Geders* v. *United States*, 425 U.S. 80, 89 (1976) (right to consult). The sixth amendment right to counsel is necessarily diluted by the process of a spacially bifurcated proceeding. In the instant case, the respondent's attorneys were denied the opportunity to fully communicate with their client.

The statute places the defense attorney, the prosecutor, and the child witness in one room, and the defendant, the factfinder, and the judge in another room. This arrangement produces the following phenomena: (1) constitutionally guaranteed attorney-client communication can only be accomplished over the telephone and/or through another attorney over the telephone and outside of the visual scope of the attorney; (2) the attorney with the witness is totally unaware of nonverbal communication taking place in the courtroom, including that which is being given or received by either the factfinder or the judge; and (3) the attorney with the child fact witness was precluded from offering or receiving nonverbal communication with the client.

The defense attorney with the witness and the prosecutor—during both direct examination and cross-examination—could not simultaneously (1) hear and see the fact witness, (2)

observe the respondent's reaction to the fact witness, and (3) observe the factfinder's reaction to the fact witness. Moreover, under the statute, the defense attorney cannot prevent prosecutorial overreaching, such as nonverbal prosecutorial communication with the child fact witness during the child's testimony. Because the judge is not even present and cannot observe the prosecuting attorney, the judge cannot even intelligently rule on any objections made by defense counsel. *See State* v. *Warford*, 223 Neb. 368, 389 N.W.2d 575, 581-82 (1986).

Moreover, in the instant case, the only means of communication between the respondent and her attorney worked sporadically at best. The respondent and counsel with her in the courtroom were unable to communicate with counsel present with the child fact witness during the entire competency voir dire. The respondent, by reason of her special knowledge of this child's intellectual, psychological, and moral capabilities, was in the unique position of being able to greatly assist her counsel in this voir dire. As the "problem" was not even discovered until the voir dire was completed, the respondent was unable to assist counsel or impact on the voir dire in any way. The trial judge was in chambers with the child fact witness, qualifying her as to competency, and could not observe, unlike later during the proceeding, the respondent's difficulty and inability to communicate through the "supposedly" open phone line. After the competency voir dire was completed, and the judge and counsel returned to the courtroom and the jurors brought in to view the examination of the child fact witness, via television monitors, the sheriff then brought the respondent's communication problem to the court's attention.

> THE SHERIFF: I don't believe counsel can communicate. Just haven't found him.
>
> THE COURT: Well, maybe he hasn't picked up the phone so . . . Sheriff, if you're ready to proceed you can do so. I will instruct the clerk to swear in the witness.
>
> . . .
>
> MR. KOLODNER: Counsel says he's been trying to reach me on the phone and . . . many times and has not been able to reach me. I've been in there saying, I'm here, does anyone want to say anything to me, but I haven't been able to get any response.

THE COURT: Have you pushed the button down?

MR. KOLODNER: I didn't know . . . I didn't push any button.

THE COURT: Sorry about that, but you're supposed to push the button.

MS. O'DONNELL (the prosecutor): I'm not aware. Your Honor, I would suggest that perhaps we excuse the jury and work out the wrinkles and. . .

MR. KOLODNER: That's ironic. I didn't know there was a button. Maybe I did something wrong because the button. . .

. . .

THE COURT: Sheriff, would you just come here a minute, please? I'm not trying to take you to task or anything. Is it going to take a little while—are you having a problem with that?

THE SHERIFF: Yes sir.

THE COURT: Okay, probably on this note we might break for lunch, okay? Do you want to do that. And apparently counsel's having problems communicating with his colleague at the trial table on the . . . my telephone.

THE SHERIFF: Do you have any problems with me putting another telephone in there?

THE COURT: I . . . you can put anything in there.

MR. KOLODNER: Well, was I supposed to push anything?

THE COURT: Was he to push the button down or something?

THE SHERIFF: No, you should just talk.

MR. KOLODNER: I way saying. . .

THE SHERIFF: Did you hang it up?

MR. KOLODNER: Have it hung up, no. Well, you were in there when I kept saying, I'm on here, is anyone talking.

. . .

THE SHERIFF: Sorry, about this, Your Honor. Yesterday it worked fine, no problems at all.

After working on the "phone problem," the court allowed the direct and cross-examination of the child fact witness to proceed (J.A. 89-139). The respondent was again unable to reach

counsel in chambers and unable to communicate with him in any way during the entire direct and cross-examination. Despite her unique ability to assist her counsel, she was unable to do so because she could not communicate with him.

Moreover, by having the judge make the factual determination of whether the child will experience trauma when testifying, the statute denies the right to trial by jury by making the judge the finder of the ultimate fact of the truthfulness of a witness.

The State posits "the need to protect particularly vulnerable child victims from the trauma of testifying in the physical presence of the accused" as one of the two compelling state interests justifying the use of child protective measures such as one-way closed-circuit television. Petitioner's Brief at 14. The premise to this argument must necessarily be that the child is a truthful witness, and that the child's trauma will impair truthful testimony.

The crucible of confrontation is the test of truth in the courtroom. The rigor of face-to-face confrontation impresses the witness with "the seriousness and solemnity of the occasion," *Wildermuth* v. *State*, 310 Md. 496, 513, 530 A.2d 275, 283 (1987), and "aids the fact-finder in distinguishing the false accuser from the true, the uncertain from the sure." *State* v. *Vincent*, 159 Ariz. 418, 768 P.2d 150, 162 (1989). Both the majority and concurring opinions in *Coy* recognize that trauma may confound and undo the false accuser, as well as impair the search for truth. *Coy*, 108 S. Ct. at 2802, 2804.

For centuries, the factfinder, observing the demeanor of the fact witness and relying upon common experience, decided whether the witness was telling the truth or a lie. "This open examination of witnesses *viva voce*, is the preference of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination. . . . In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 W. Blackstone, *Commentaries* *373.

The State naturally endorses this Court's observation that face-to-face testimony may upset the truthful abused child.

The State admits that the trauma may come from the courtroom generally or from having to face and adult authority figure who has been both physically and psychologically abusive. Petitioner's Brief at 23.

The State, however, is silent with respect to the other source of trauma identified by this Court in *Coy:* trauma that "may confound and undo the false accuser, or reveals the child coached by a malevolent adult." *Coy,* 108 S. Ct. at 2802. Certainly, if this Court wishes to balance the competing interests of the accused and the accuser with respect to testimonial trauma, it wants to accomplish the following: all trauma that upsets the truthful abused child should be checked; all trauma that confounds and undoes the false accuser or reveals the child coached by a malevolent adult should be exploitable by counsel within the rules of evidence and procedure.

Nevertheless, the Maryland statute—and the state in its brief—provide that all a judge need do is determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). No inquiry need be made, much less by a particular standard of persuasion, as to the truth or falsity of proferred child testimony. Thus, whether the testimony will result in the child suffering serious emotional distress because the child is telling a painful truth, or whether the testimony will result in the child suffering serious emotional distress because the child is a false accuser coached by a malevolent adult, the State is equally entitled to the use of the special procedure, in lieu of face-to-face confrontation, in the prosecution of its case.[7]

The net effect to the defendant is that the accuser is presumed to be suffering from that type of trauma associated with telling a painful truth, without any evidence in support of that

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[7] If the parents of a child victim file a civil suit, the child would be subject to civil deposition in the presence of the civil defendant. Thus, while the statute permits taking the defendant's liberty without face-to-face confrontation, the law does not permit taking the civil defendant's money without face-to-face confrontation.

premise. If the trial court finds that face-to-face testimony will result in the child suffering serious emotional distress, the court may permit the child to testify outside of the presence of the judge, the factfinder, and the defendant. In so deciding, the judge determines a fact heretofore left to the factfinder—the credibility of the witness. The judge necessarily decides that the trauma is upsetting the "truthful" abused child. Through the use of this statute, the State intrudes upon the defendant's right to trial by jury because the State has legislated the credibility of the child fact witness in contravention of the defendant's sixth amendment right to trial by jury.

III. EVEN IF THE MARYLAND STATUTE IS CONSTITUTIONAL, IT IS UNCONSTITUTIONAL AS APPLIED, BECAUSE THE TRIAL JUDGE FAILED TO MAKE AN INDIVIDUALIZED FINDING, BASED UPON PERSONALLY QUESTIONING AND OBSERVING THE CHILD FACT WITNESSES IN THE DEFENDANT'S PRESENCE, THAT EACH OF THEM WOULD SUFFER SERIOUS EMOTIONAL DISTRESS, CAUSALLY CONNECTED TO TESTIFYING IN THE PRESENCE OF THE DEFENDANT.

As this Court recognized in *Coy,* if there are exceptions to the "most literal application" of the confrontation clause, "something more than [a] generalized finding . . . is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Coy,* 108 S. Ct. at 2803 (Scalia, J.). If there are to be exceptions, they must "further an important public policy . . . . The primary focus . . . will be on the necessity prong. [M]ore than [a] generalized legislative finding of necessity . . . is required. [The court must make] a case-specific finding of necessity, . . ." *Id.* at 2805 (O'Connor, J., concurring).

This is consonant with a number of state courts that have interpreted child shield statutes. *See State* v. *Wilhite,* 160 Ariz. 228, 772 P.2d 582 (1989) (videotape testimony unconstitutional under the sixth amendment and state constitution when the State failed to show that the child witness needed special protection from a face-to-face courtroom encounter with the defendant); *State* v. *Davidson,* 764 S.W.2d 731 (Mo. 1989)

(deposition improperly admitted when the State failed to introduce evidence as to trauma the child would suffer by testifying in the presence of the defendant); *State* v. *McCutcheon*, 234 N.J. Super. 434, 560 A.2d 1303 (1988) (only children found by the court to "suffer severe emotional or mental distress" by being forced to testify in court, face-to-face with the alleged abuser, could testify via closed-circuit television); *State* v. *Eastham*, 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988) (out-of-court testimony of a child broadcast to defendant in the courtroom by concealed video camera violated sixth amendment and state constitution because there was no particularized finding of necessity); *Commonwealth* v. *Ludwig*, 366 Pa. Super. 361, 531 A.2d 459 (1987), *appeal granted*, 518 Pa. 617, 541 A.2d 744 (1988) (closed-circuit television approved after psychologist testified that victim would be traumatized again if required to testify in court in the physical presence of her father); *State* v. *Taylor*, 562 A.2d 445, 453 (R.I. 1989) (state constitution requires an attempt to have the child testify in the defendant's presence).

This is consistent with the protections that some states have provided. *See, e.g.*, Mass. Gen. L. ch. 278, § 16D(b)(3) (1986) ("The defendant shall also have the right to be present unless the court's order under paragraph (1) is based wholly or in part upon a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant"); Minn. Stat. § 595.02 (1988) ("If the court, upon its own motion or the motion of any party, determines that the presence of the defendant during testimony taken pursuant to this subdivision would psychologically traumatize the witness . . ."); N.J. Stat. Ann. § 2A:84A-32.4(b) (West Supp. 1989) (order for closed-circuit televised testimony must be "specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact in the presence of each").

In Maryland, by statute, before the use of extraordinary procedures is permitted, the trial judge must first determine that "testimony by the child victim *in the courtroom* will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc.

Code Ann. § 9-102(a)(1)(ii) (1989) (emphasis added). In the instant case, the trial judge did not have the judicial gloss of the Court of Appeals of Maryland, later provided in *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987). Nor did the judge have this Court's gloss of the Iowa statute in *Coy*. Consequently, the trial judge in the instant case literally applied the language of the statute.

The trial judge (1) had the benefit only of expert testimony on the ability of the children to communicate, (2) did not question any of the children himself, (3) did not observe any child's behavior on the witness stand before making his ruling, (4) did not question the experts himself to focus the direct examination of the prosecutor, and (5) did not distinguish between "in the courtroom" and "in the defendant's presence." The trial judge ruled that "'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate." *Craig* v. *State*, 316 Md. 551, 570, 560 A.2d 1120, 1129 (1989) (emphasis added by the Court of Appeals of Maryland).[8] Only after the imposition of the extraordinary statutory procedure in the instant case did the Court of Appeals of Maryland have occasion to interpret section 9-102. In *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), the court upheld the facial constitutionality of the statute. Reasoning that the right to face-to-face confrontation is not absolute, the court fashioned a two-part "appropriate cir-

[8] Imagine the possibility that the child fact witness, found unable to communicate in the presence of the defendant, based solely upon the testimony of an expert, later files civil suit against the criminal defendant. If during the initial discovery process, the child witness is able to give deposition testimony in the presence of the prior criminal (now civil) defendant, the accused's attorney would likely file post-conviction relief on the basis of newly discovered evidence. It might reasonably be argued that the courtroom—not the defendant—is what caused the serious emotional distress of the child witness. If this fact is established, the court may grant a new trial, finding that the accused at the prior criminal trial was denied the right to confrontation.

cumstances test." The first part of the test is the existence of a compelling state interest. The second part of the test is a particularized determination of the functional unavailability of the child witness as a result of the inability to testify, in turn caused by serious emotional distress. In applying the test, the court found that "[w]hile personal observation by the judge may not be a *sine qua non* under [section] 9-102, it should be the rule rather than the exception." *Id.* at 524, 530 A.2d at 289.

The Court of Appeals of Maryland next had occasion to consider the statute in the instant case. In *Craig* v. *State*, 316 Md. 551, 560 A.2d 1120 (1989), the court of appeals utilized principles of statutory construction, applied in light of the arguments of counsel in *Craig*, its earlier decision in *Wildermuth*, and this Court's opinion in *Coy*. The court found that the inquiry of the trial judge in determining the threshold issue of whether a child fact witness would suffer severe emotional distress, if required to testify "in the courtroom," should have been asked in the much narrower context of the ability of the witness to testify in the courtroom in the presence of the accused. The court determined that the trial judge should not make a general inquiry regarding the child's inability to testify in open court, because such a finding is too broad to satisfy the necessity requirement of these extraordinary proceedings. *See State* v. *Crandall*, 231 N.J. Super. 124, 131-32, 555 A.2d 35, 39, *cert. granted*, 117 N.J. 143, 564 A.2d 866 (1989) (finding that the child witness would suffer "substantial emotional upset" if required "to testify in court" was insufficient to support the use of close-circuit television to receive the child's testimony).

The analysis of the Court of Appeals of Maryland is sound. A finding of severe emotional distress, and a finding that such stress is causally related to testifying in the live, face-to-face presence of the defendant, is absolutely critical to support an exception to the otherwise absolute requirement of face-to-face confrontation. The court stated: "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony . . ." *Craig*, 316 Md. at 565, 560 A.2d at 1127 (citing with approval *State* v. *Vincent*, 159 Ariz. 418, 432, 768 P.2d 150, 164 (1989); *State* v. *Jarzbek*, 210 Conn. 396, 397, 554 A.2d 1094,

1095 (1989); *State* v. *Bonello*, 210 Conn. 51, 58-59, 554 A.2d 277, 281, *cert. denied*, 109 S. Ct. 2103, *reh. denied*, 109 S. Ct. 3268 (1989). The Court of Appeals of Maryland concluded that the operative statutory language of "serious emotional distress," which renders a child victim unable to "reasonably communicate," must be determined to arise primarily from face-to-face confrontation with the defendant. *Craig*, 316 Md. at 566, 560 A.2d at 1127.

If it is constitutional at all, the Maryland statute ordinarily cannot be invoked unless the child witness is initially questioned, either inside or outside the courtroom, in the defendant's presence, and is found by the judge to be unable to "reasonably communicate" because of "serious emotional distress" causally connected to the presence of the defendant. *Id.* at 566-67, 560 A.2d at 1127 (citing *Wildermuth* v. *State*, 310 Md. 496, 523-24, 530 A.2d 275, 289 (1987)) (personal observation by judge should be the rule rather than the exception).

Testimony of experts, given pre-*Wildermuth* and pre-*Coy*, in the context of the limited question of whether the child would be unable to testify "in a courtroom," cannot support an exception to the right to face-to-face confrontation. The Court of Appeals of Maryland recognized that some of the expert testimony did suggest that each child would have some, or even considerable, difficulty in testifying in the defendant's presence. However, upon careful review of the expert testimony, in the context of the statute, the court of appeals concluded that the testimony of the experts was not sharply focused on the effect of the defendant's presence on the child witness, and that —in any event—the trial court relied entirely upon the testimony of experts regarding what the likely future event of the child's testimony would be. *Id.* at 570, 560 A.2d at 1129.

Applying the statute literally, the trial judge did no more than find, on the evidence before him, that serious emotional distress, resulting in an inability to communicate, would be the product of testimony in a courtroom. The Court of Appeals of Maryland, after carefully considering the expert testimony, held that the trial judge could not have found that the severe emotional distress, supposedly resulting in an inability to communicate, was in any way related to testifying in the presence

of the defendant. *Id.* The trial judge failed to make an individualized finding that the child fact witnesses needed special protection from testifying in the presence of the defendant. The Maryland statute is unconstitutional as applied to the respondent.

IV. EVEN IF THE MARYLAND STATUTE IS CONSTITUTIONAL, THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND SHOULD NEVERTHELESS BE AFFIRMED BECAUSE ITS JUDGMENT WAS BASED SOLELY UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has recognized that the issue of "adequate and independent state grounds is based, in part, on the 'limitations of our own jurisdiction.'" *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). In *Long*, the Court set forth a standard that it has applied ever since, when it stated:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

Any litigation under section 9-102 would necessarily include, by any competent attorney, a challenge under the sixth amendment right to confrontation. The first case to present such a challenge was *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), in which the Court of Appeals of Maryland, Maryland's court of last resort, upheld the constitutionality of section

9-102. However, as to one of the two appellants, the court reversed the conviction because the trial judge failed to satisfy the state statutory requirements. The court stated:

> Each appellant now launches a multifaceted attack on his convictions. The central thrust in each case is the contention that § 9-102 is unconstitutional because it violated the confrontation clause of the sixth amendment to the United States Constitution (applicable to the states through the fourteenth amendment) as well as art. 21 of the Maryland Declaration of Rights. We reject those contentions. We also reject appellants' other constitutional assaults on § 9-102, and affirm McKoy's convictions. We reverse Wildermuth's convictions and remand his case for a new trial, however, because we agree that in his case the threshold showing essential to the invocation of § 9-102 has not been made.

310 Md. at 501, 530 A.2d at 277.

The court began by analyzing and upholding the statute in terms of the constitutional guarantees under the sixth amendment right to confrontation. *Id.* at 504-20, 530 A.2d at 279-87 (section A. of the opinion was entitled "Scope of the Right to Confrontation"; section B. was entitled "Application of Section 9-102 Does Not Result in the Unconstitutional Denial of Defendants' Right to Confrontation").

The court then turned "to the question of whether the evidence before Judge Williams in Wildermuth's case was sufficient to support his section [9-102](a)(1)(ii) finding." *Id.* at 520, 530 A.2d at 287 (section C. was entitled "The Finding of 'Unavailability' in Wildermuth's Case"). The court's six page analysis of the statute and its application in the instant case resulted in the following holding:

> While the testimony need not be given in the precise words of the statute, it must be clear that the statutory requirements are met in substance. Testimony about the likely impact on the child testifying must be definite, related to the statutory standard, and specific to the potential child witness him or herself. . . .
>
> The evidence in Wildermuth's case was not enough.[9]

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[9] The conviction of McCoy, the other appellant, was affirmed because he conceded at trial that his challenge was purely constitutional and not based on the failure to satisfy the statutory prerequisites. *Id.* at 520, 530 A.2d at 287.

Id. at 524-25, 531 A.2d at 289.

Section 9-102(a)(1)(ii) requires that the "judge determine[] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). The court found insufficient evidence to support the statutory requirement. *Id.* at 523, 530 A.2d at 288. Moreover, the trial judge "never questioned or even observed the child witness before he made his ruling. While personal observation by the judge may not be a *sine quo non* under § 9-102, it should be the rule rather than the exception." *Id.* at 523-24, 530 A.2d at 289. The court held that the failure to comply with the state statute required a reversal of Wildermuth's conviction.

Subsequent to *Wildermuth*, this Court decided *Coy* v. *Iowa*, 487 U.S. 1012 (1988), which provided additional judicial gloss on the sixth amendment right to confrontation. The instant case was briefed and argued in the intermediate appellate court prior to the Court's decision in *Coy*. The Court of Appeals of Maryland "granted a writ of certiorari chiefly in order to reexamine *Wildermuth* in the light of the Supreme Court's pronouncements in *Coy*." *Craig* v. *State*, 316 Md. 551, 556, 560 A.2d 1120, 1122 (1989). Judge Atkins, who wrote for a unanimous court in *Wildermuth*, wrote again for a unanimous court in *Craig*.

Like in *Wildermuth*, the *Craig* court necessarily addressed the sixth amendment. *Id.* at 556-62, 560 A.2d at 1122-25 (part II of the opinion). A fair reading of *Craig* can in no way give rise to the argument that the court's decision either rested primarily on federal law or is inextricably woven with federal law. To the contrary, as its holding makes clear, the Court of Appeals of Maryland meticulously analyzed *Coy*, only to refute the respondent's contention that section 9-102 was unconstitutional, either on its face or as applied.

In light of *Coy's* holding that the sixth amendment requires, at least under the facts of *Coy*, face-to-face confrontation, the Court of Appeals of Maryland provided some additional judicial gloss on section 9-102—gloss that would not have been needed to resolve *Wildermuth* and gloss that was in no way dispositive

of *Craig*. Section 9-102(a)(1)(ii) requires that the "judge determine[] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." In light of *Coy*, the court of appeals interpreted "in the courtroom" to mean "in the courtroom in the presence of the defendant." *Id.* at 566, 560 A.2d at 1127.[10] The court then discussed the difference between making a determination as to serious emotional distress (1) from testifying in the courtroom and (2) from testifying in the presence of the defendant.

However, despite the relevance—and under the respondent's position, the correctness—of this distinction, the Court of Appeals of Maryland had no need to—and did not—employ this distinction to resolve the case. Instead, the court resolved the case based on the trial judge's failure to comply with the requirements of section 9-102(a)(1)(ii), as it had previously interpreted that section in *Wildermuth*.

> Whether the trial judge might have narrowed the generality of this testimony, had he questioned the potential witnesses, we cannot tell. *He did not question them; he did not have before him our declaration that "personal observation [and inquiry] by the judge . . . should be the rule rather than the exception."* *Wildermuth*, 310 Md. at 523-24, 530 A.2d at 289.

Craig, 316 Md. at 570, 560 A.2d at 1129 (emphasis added) (brackets in *Craig*).

The resolution of *Wildermuth*, based on the interpretation of the state statute, followed by the resolution of *Craig*, based on

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[10] Of course, the statute implicitly already required "in the presence of the defendant" because, as the court noted, "[w]hen we read § 9-102(a)(1)(ii), we approach construction of the phrase 'in the courtroom' with the understanding that the 'meaning of the plainest language' is controlled by the context in which it appears." *Id.* at 566, 560 A.2d at 1127. Applying a state law principle of statutory construction, the court stated that "as a general rule a statute will be construed to avoid constitutional conflict whenever feasible. We also presume that the General Assembly intended its enactments to be in harmony rather than at odds with [the] United States Constitution." *Craig*, 316 Md. at 566, 560 A.2d at 1127 (citations omitted).

the *Wildermuth* gloss of the statute, presents this Court with the situation of an improvidently granted writ of certiorari in *Craig*. An examination of *Aimone* v. *Finley*, 465 U.S. 1095 (1984), and *California* v. *Freeman*, 109 S. Ct. 854 (1989), both of which this Court dismissed for want of jurisdiction, and *New York* v. *Class*, 475 U.S. 106 (1986), in which the court properly asserted jurisdiction, make clear that the writ of certiorari was improvidently granted in the instant case and that this Court lacks jurisdiction.

In *Aimone* v. *Finley*, the Court dismissed for want of jurisdiction. Prior to *Aimone*, in *In re Roger B.*, 84 Ill. 2d 323, 418 N.E.2d 751 (1981), the Supreme Court of Illinois upheld the state adoption act as constitutional, against a challenge that it was violative of the equal protection clause of the United States Constitution. In *Aimone* v. *Finley*, 113 Ill. App. 3d 507, 447 N.E.2d 868 (1983), the plaintiff mounted a due process challenge, which the court rejected. The court stated:

> [W]e find the opinion in *In Re Roger B.* actually transcends the issue of constitutionality and considers the broad background of the policy considerations in protecting the privacy of both the adopting parents and also of the natural parents.
>
> . . .
>
> Therefore, we conclude the issues raised by plaintiff are settled by the [state] supreme court in *In Re Roger B.* The [state] supreme court expressly held "the trial court did not abuse its discretion in concluding that [plaintiff's] desire to obtain release of the records should not prevail over the potential infringement of the rights of other parties." 84 Ill.2d 323, 336-37, 49 Ill.Dec 731, 418 N.E.2d 751.

Id. at 511, 447 N.E.2d at 870. This Court "dismissed for want of jurisdiction, it appearing the judgment below rested upon independent and adequate state grounds." *Aimone* v. *Finley*, 465 U.S. 1095 (1984).

On the other hand, in *New York* v. *Class*, 475 U.S. 106 (1986), this Court rejected a claim of independent and adequate state grounds, stating:

> Respondent's claim that the opinion below rested on independent and adequate state *statutory* grounds is . . . without merit. The New York Court of Appeals did not hold that [the statute] prohibited the search at issue here, but, in rejecting an assertion of petitioner, merely held that [the statute] "provided no *justification*" for a search . . . . In determining that the police officer's action was prohibited, the court below looked to the Federal Constitution, not the State's statute. Moreover, New York adheres to the general rule that, when statutory construction can resolve a case, courts should not decide issues. . . . Since the New York Court of Appeals discussed both statutory and constitutional grounds, we may infer that the court believed the statutory issue insufficient to resolve the case. The discussion of the statute therefore could not have constituted an independent and adequate state ground.

Id. at 110 (emphasis in original).

Maryland, like New York, resolves its statutes, whenever possible, on statutory construction grounds, avoiding even reaching constitutional issues. In *Davis* v. *State*, 312 Md. 172, 539 A.2d 218 (1988), the Court of Appeals of Maryland stated: "As a matter of statutory construction, this Court has consistently adhered to the principle that we will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality." *Id.* at 179-80, 539 A.2d at 220. The Court of Appeals of Maryland also applied this principle of state statutory construction in the instant case below. *Craig*, 316 Md. at 566, 560 A.2d at 1127 ("construed to avoid constitutional conflict whenever feasible").

In *Class*, this Court determined that the New York Court of Appeals did not find that the state statute imposed a limitation on the police greater than that imposed by the federal constitution. The Court implied that, in light of New York's statutory construction rules, had the state court been able to find a way to interpret the state statute to control, it would have. However, the New York court did not so find, and thus it resolved the case on federal constitutional grounds.

The Maryland situation in the instant case presents precisely the opposite scenario from *Class*. In *Wildermuth*, the Court of Appeals of Maryland found no constitutional violation but did find a state statutory violation and resolved the case on that basis. 310 Md. at 524-25, 530 A.2d at 289. In *Craig*, the Court of Appeals of Maryland recognized that a constitutional issue was

possible in light of *Coy*. However, in light of a clear statutory violation of nonconstitutional dimension, combined with the court's approach of avoidance, whenever possible, of constitutional claims, the court resolved the case with a plain statement as to the adequate and independent state grounds on which is was relying.

This Court's most recent application of the *Michigan* v. *Long* doctrine was last term in *California* v. *Freeman*, 109 S. Ct. 854 (1989). In *Freeman*, the defendant, a producer and director of pornographic films, was convicted of pandering. The California Supreme Court reversed, holding that because the payments were acting fees, there was no evidence that the acts were performed for sexual arousal or gratification. *People* v. *Freeman*, 46 Cal. 3d 419, 424-25, 250 Cal. Rptr. 598, 600, 758 P.2d 1128, 1131 (1988). The Court also observed that, even if the conduct came within the scope of the statute, such an application "would impunge unconstitutionality upon First Amendment values." *Id.*

The State petitioned for a writ of certiorari to review the first amendment holding. Justice O'Connor denied the application for stay based on this Court's lack of jurisdiction. Her holding was based on the fact that the California Supreme Court resolved the case on its interpretation of a state statute, noting that "[i]nterpretations of state law by a State's highest court are, of course, binding on this Court." 109 S. Ct. at 856. Justice O'Connor further stated:

> The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled, "First Amendment Considerations." The state court's discussion of the language of the Penal Code . . . concludes with the clear holding [based on the statutory language]. Discussion of . . . the First Amendment . . . constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result of the doctrine of adequate and independent state grounds seeks to avoid.

109 S. Ct. at 856.

In *Craig*, the Court of Appeals of Maryland resolved the case on a statutory construction analysis, as those principles were applied earlier in *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987). Thus, this Court should dismiss the writ of certiorari as improvidently granted. Moreover, even if this Court were to find Judge Atkins' discussion concerning the constitutional issues surrounding the statute, as applied in light of *Coy*, to be a holding in *Craig*, the result should be the same. As in *Freeman*, there is a plain statement as to a statutory resolution of the case, which "constitutes an independent alternative holding." 109 S. Ct. at 856. Thus, regardless of the relationship between the sixth amendment and section 9-102, as applied in the instant case, the provisions of the statute, be they of constitutional dimension or not, were not satisfied, and the respondent's convictions cannot stand.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment of the Court of Appeals of Maryland. This disposition is fully supported by each of the respondent's four arguments. If the Court is persuaded that the integrity of the factfinding process requires an absolute sixth amendment right to face-to-face confrontation, under those circumstances argued by the respondent, the Court should declare the Maryland statute unconstitutional and affirm the judgment of the Court of Appeals of Maryland. If the Court is at least persuaded that the sixth amendment right to face-to-face confrontation outweighs any countervailing interests, the Court should declare the Maryland statute unconstitutional and affirm the judgment of the Court of Appeals of Maryland. If the Court is at least persuaded that the trial court failed to make an individualized finding to support the denial of the sixth amendment right to face-to-face confrontation, the Court should declare the Maryland statute unconstitutional, as applied in this case, and affirm the judgment of the Court of Appeals of Maryland. If the Court is persuaded that the Court of Appeals of Maryland resolved this case based on independent and adequate state grounds, the Court should dismiss the writ of certiorari as improvi-

dently granted and affirm the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I. LESS THAN FACE-TO-FACE CONFRONTATION IS PERMISSIBLE WHEN IT FURTHERS AN IMPORTANT PUBLIC INTEREST AND IS BASED ON CASE-SPECIFIC FINDINGS OF NECESSITY.

Respondent Craig acknowledges that the right to face-to-face confrontation is not absolute (Br. 10-11), but then urges this Court to "recognize the need for, and adopt, an inflexible rule of right to face-to-face confrontation in all situations not coming within a long-recognized exception to the rule against hearsay" (Br. 23). Craig's proposed rule eviscerates the flexi-

bility that has been the hallmark of this Court's approach to confrontation issues. *E.g.*, *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Indeed, Craig's inflexible rule requires this Court to jettison its 1980 landmark decision on confrontation and to veer radically from the "middle course" the Court has chosen to follow. *Ohio v. Roberts*, 448 U.S. 56 & 66 n.9 (1980).

In *Ohio v. Roberts*, the Court recognized that hearsay statements fitting within a firmly-rooted exception, as well as those that do not, may be admissible. *Id.* at 66. The latter, however, must first be shown to satisfy particularized guarantees of trustworthiness. *Id.*; *accord Bourjaily v. United States*, 483 U.S. 171, 183 (1987). Craig's proposed rule directly contravenes what the *Roberts* Court said about non-traditional hearsay exceptions. More importantly, it disregards the fact that in *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2803 (1988), the Court borrowed from *Roberts* and *Bourjaily* to suggest that a child-protective device that implicates a defendant's right to face-to-face confrontation, but which is not firmly rooted in our legal tradition, may be permissible if supported by individualized findings of necessity.

Not only has Craig's rigid rule already been rejected by the Court, the two premises underlying the

rule are faulty. Craig first posits an absolute need for face-to-face confrontation (except when hearsay fits within a firmly-rooted exception) because "[c]onfrontation is the 'greatest legal engine ever invented for the discovery of truth.' " (Br. 10 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)). This premise distorts the oft-quoted language of Wigmore, which refers expressly to cross-examination, not to confrontation. 5 J. Wigmore, *Evidence* § 1367, at 29 (3d ed. 1940). It also fails to take into account that Craig was permitted to cross-examine each child witness at trial without restriction. (J.A. 102-49, 152-53 (Brooke Etze); 179-92, 195-96 (Drew Woodbury); 225-42 (Jessie Sue Smith); 260-70 (Justin Peeples)). Furthermore, because the right to cross-examine is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation," *Davis v. Alaska*, 415 U.S. 308, 316 (1974), it is illogical to say that the face-to-face component of cross-examination cannot be precluded when it not merely harasses a child witness, but actually causes the child to be entirely incapable of testifying.

Craig's second premise—that the integrity of the fact-finding process requires nothing less than face-to-face confrontation—is equally faulty. In Craig's view, which she supports in part by referring to the child abuse cases from Jordan, Minnesota (Br. 17-18), child witnesses are particularly susceptible to pre-trial coaching and other suggestive procedures, and the resultant unreliability can only be ferreted out by compelling children to testify in the physical presence of the defendant, the judge, and the jury. (Br. 13-23). This proposition cannot withstand scrutiny for any number of reasons.

First, to the extent that Craig suggests that she has been the victim of false accusations and hysteria, she digresses from the constitutional issue before this Court. In any event, the record here belies such a contention.[1] The medical evidence adduced at trial confirmed the children's complaints of abuse. Through Dr. Shubin, a clinical pediatrician specializing in the field of child sexual abuse, the State demonstrated the very real nature of the genital and anal injuries sustained by Brooke Etze and the three other children who testified at trial via closed-circuit television.[2]

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[1] For the reasons that follow in text, the record also belies any similar suggestion that might be gleaned from Craig's Statement of the Case. (Br. 1-8). Moreover, because the record in this case consists of a transcript in excess of 4,000 pages and numerous exhibits, it is difficult even to discern, absent references to the joint appendix or the record, the factual basis of Respondent's statement.

[2] For example, Dr. Shubin explained that Brooke's hymen "gaped open to a one point five centimeter or fifteen millimeter diameter opening" (Tr. 3/17/87, at 165); the opening of a normal hymen of a child of Brooke's age is four millimeters (*id.*). Additionally, "the hymen itself was not normal." (*Id.* at 166). At its lower edge, it "was considerably thickened"; there also was "a retracted scar which means that the hymen had a part of it not smooth all the way around, but pulled back into the tissue of the vagina itself." (*Id.*). Brooke also "had scarring in the tissue adjacent to the hymen which is, in fact, vaginal wall." (*Id.* at 167). In Dr. Shubin's opinion, Brooke's injuries were caused by "[s]ome object" being "pushed into this child past an inch and a quarter." (*Id.* at 170).

Regarding Drew Woodbury, Dr. Shubin described a linear, *i.e.*, straight-line, scar that extended from the interior of Drew's anus to the outside skin. (Tr. 3/23/87, at 5-7). This abnormal scar represented a healed injury caused by "an object penetrating from outside into this child's anal opening." (*Id.* at 8). Dr. Shubin further testified that Jessie Sue Smith's perihymenal

The evidence presented at trial also demonstrated that Sandra Craig was the person who inflicted the abuse described by the children and corroborated by Dr. Shubin. Craig was a common variable in the lives of the four children. (Tr. 3/16/87, at 143; Tr. 3/20/87, at 61, 143, 191). She was shown, by witnesses other than the four children, to have taken children, including Brooke Etze, to her upstairs office. (Tr. 3/17/87, at 85-86; Tr. 3/18/87, at 161-63; Tr. 3/19/87, at 112-14). The children would look frightened and withdrawn when they returned. (Tr. 3/19/87, at 113-14). Craig also demonstrated a great deal of anxiety when she could not find a certain stick that was fourteen to eighteen inches in length and approximately a quarter inch in diameter. (*Id.* at 118-19, 144-46). Brooke testified that Craig had touched her in her

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tissue was severely scarred. (*Id.* at 10-11). One scar revealed that the tissue had been stretched; a second scar indicated that the tissue surface probably had been broken by the original injury. (*Id.* at 11). In Dr. Shubin's expert view, "there must have been a penetrating injury from an object pushed in from outside. It was pushed toward the back of the vaginal opening because that's where the injuries are." (*Id.* at 14).

Examination of Justin Peeples's anus revealed an "eight millimeter square depressed scar." (*Id.* at 18). Dr. Shubin explained that he had "never seen such a strikingly well demarcated square scar in this area of a child." (*Id.* at 19). He described the scar as "consistent with an injury caused by the tip of a screwdriver being pushed into the tissue and damaging it." (*Id.*). As to this injury and those sustained by Brooke, Drew, and Jessie, Dr. Shubin testified that there was a "remarkable consistency in pattern," that "all requir[ed] the same mechanical force," and that "there is certainly evidence that an object has been forced into each of these children in a similar manner." (*Id.* at 21). Even the pediatrician who examined the children on behalf of Craig did not contradict these findings. (Tr. 3/26/87, at 172-93).

private parts with a stick. (J.A. 95). All of this evidence corroborated the children's claims that they had been abused and that Craig was their abuser.[3]

Craig's second premise is also based on the mistaken notion that child witnesses will lie unless forced to testify in the courtroom. (Br. 21). To the contrary, child victims of abuse are likely to provide more, not less, accurate evidence if permitted to testify outside the defendant's presence. *See* Brief for American Psychological Association as *Amicus Curiae* 18-23; *Coy v. Iowa*, 108 S.Ct. at 2809 n.5 (Blackmun, J., dissenting).[4] Furthermore, before the children here were permitted to testify via closed-circuit television, the trial court examined them for competency, determining that each child knew the difference between telling the truth and telling lies; that each knew that it was wrong to lie; and that each would testify about what he or she remembered and would not say things that someone else may have told them. (J.A. 74-82

[3] The fact that some of the children also may have been abused by Craig's son, Jamal, does not undermine the children's claims that they were abused by Craig. Both the trial court and the Maryland Court of Special Appeals expressed this same view, in the context of an issue that is not before this Court. (Pet. App. 39a-40a).

[4] *Accord* Brief for People Against Child Abuse, The Association for Childcare Excellence, The National Center for Missing and Exploited Children, and Rosie's Patrol as *Amici Curiae* 14-18; Brief for National Association of Counsel for Children; The National Court Appointed Special Advocate Association; The State of Alaska, Office of Public Advocacy; and The State of Rhode Island, Office of the Child Advocate as *Amici Curiae* 20-23; Brief for Stephanie Roper Foundation as *Amicus Curiae* 16-19.

(Brooke Etze); 164-76 (Drew Woodbury); 197-208 (Jessie Sue Smith); 244-54 (Justin Peeples)).

Moreover, Craig had ample opportunity to cross-examine each child witness. Of course, cross-examination is the appropriate tool for testing a witness's recollection, probing the details of a witness's motives for testifying, and sifting a witness's conscience so that the jury can determine whether the testimony is worthy of belief. *See Chambers v. Mississippi*, 410 U.S. at 295; *Mattox v. United States*, 156 U.S. at 242-43. That the jury viewed this cross-examination via television monitors did not undermine its efficacy, and may well have improved the jury's opportunity to assess the children's demeanor. *See* Brief for Stephanie Roper Foundation as *Amicus Curiae* 19-21.

Craig's second premise fails for the related reason that it misapprehends what this Court means when it speaks of the integrity of the truth-determining process. The integrity of the truth-determining process contemplates that the jury will be provided with relevant raw data, *i.e.*, evidence, which it then will weigh and assess to reach a verdict. Consonant with this view, juries are permitted to consider hearsay evidence, even though the declarant is unavailable to present this testimony. *E.g.*, *Ohio v. Roberts*, 448 U.S. at 76-77. Similarly, as in *United States v. Owens*, 484 U.S. 554 (1988), and *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam), juries are allowed to hear evidence from witnesses who are unable to remember the basis of their testimony.

Under the rule proposed by Craig, only live testimony from a witness in a courtroom and hearsay testimony that falls within a firmly-rooted exception would be available for a jury's consideration. While

live courtroom testimony is obviously preferred, live testimony from a child who is fully available for cross-examination—but who is functionally unavailable to testify in the defendant's presence—is preferable to hearsay testimony, which deprives the defendant of the ability to cross-examine the declarant. Full live direct and cross-examination testimony via closed-circuit television is also preferable to testimony of a witness who lacks the ability to recall the basis for his statements. And, of course, such testimony is certainly preferable to no testimony.

In sum, this Court should reject the inflexible and illogical rule proposed by Craig, and instead adopt the standard that was foreshadowed in *Ohio v. Roberts*, 448 U.S. at 66; suggested by a majority of the *Coy* Court, 108 S.Ct. at 2803; and advocated in the concurring opinion in *Coy*, *id.* at 2805 (O'Connor, J.). Simply stated, less than face-to-face confrontation should be permissible when it furthers an important public interest and is based on case-specific findings of necessity.

II. SECTION 9-102 IS A PROPER RESPONSE TO THE IMPORTANT PUBLIC INTEREST IN PROTECTING VICTIMS OF CHILD ABUSE.

In an effort to undercut the *Coy* Court's suggestion that protecting children may warrant less than face-to-face confrontation between a defendant and a child witness, Craig contends that the State of Maryland's failure to include all child victims of all violent crimes within the purview of its statute authorizing use of one-way closed-circuit television demonstrates that the State has no such compelling interest. (Br. 24-27). Stated more particularly, in Craig's view, since the "underinclusiveness" of Section 9-102 suffices to render the statute unconstitutional, such "underinclusiveness" certainly precludes the State from demonstrating a compelling interest. (Br. 26). Craig's contention is fatally flawed in several respects.

Preliminarily, if Craig is attempting to challenge the constitutionality of Section 9-102 on the ground that it presents an equal protection problem, she should not be allowed to do so, since she never raised such a challenge in the Maryland courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, Craig's "underinclusiveness" argument is without merit.

First, Craig's reliance on language from Justice Jackson's concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949), (Br. 27), overlooks the more pertinent statement in the majority opinion: "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." 336 U.S. at 110. Second, by limiting the use of closed-circuit television to children who are victims of abuse by a parent or a person standing in loco parentis, the State not only avoids an overly broad rule like those criticized in cases such as *Coy v. Iowa*, 108 S.Ct. at 2803; *Rock v. Arkansas*, 483 U.S. 44, 56-58 (1987); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982), it also has selected only those victims who are most vulnerable to the traumatizing and chilling effects of face-to-face confrontation.

"A child's feelings of vulnerability and guilt, and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Because a parent or one standing in loco parentis is the ultimate

authority figure for a child, and because a child is most susceptible to trauma and undue influence by an authority figure, it is the child who has been abused by this very authority figure who is in the greatest need of Section 9-102's special protection. The fact that other classes of children or even other classes of victims might benefit from the protection accorded by Section 9-102 does not mean that the State has acted improperly by narrowly tailoring its statute.

Having initially taken issue with the State's failure to enact a broader statute, *i.e.*, one that covers more victims and thus implicates the confrontation right of more defendants, Craig next challenges the State's failure to enact a statute that first contemplates the use of two-way closed-circuit television. (Br. 28-29). Of course, if two-way closed-circuit television does not substantially implicate a defendant's right of confrontation, *see Coy v. Iowa*, 108 S.Ct. at 2804 (O'Connor, J., concurring), then presumably it could be used without any showing of case-specific necessity. And, if a two-way television procedure does implicate the right to confront, it does so because it induces the very trauma the one-way television procedure is designed to avoid.

Nonetheless, even if a less intrusive procedure exists, it need not be considered prior to using the one-way procedure. Indeed, by so suggesting, Craig asks this Court to adopt an analysis that heretofore has been applied only in the First Amendment arena. This Court has declined, however, to engraft a "least restrictive" requirement onto other constitutional amendments. *E.g.*, *Blystone v. Pennsylvania*, 493 U.S. ___, 110 S.Ct. 1078, 1084 (1990) (in upholding death sentence imposed under Pennsylvania statute,

which differed in form from death penalty statutes of other States, this Court said that "[w]ithin the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished"); *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)) (in upholding defendant's detention, this Court noted that " 'the fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable' "). The Court should refuse to do so in the Sixth Amendment context as well. And, nothing in this case should prompt the Court to deviate from its long-standing policy of according great deference to a state's establishment and implementation of criminal trial procedures. *E.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Chambers v. Mississippi*, 410 U.S. at 302-03.

Craig next urges this Court to reject the one-way closed-circuit television procedure because it infringes upon a host of constitutional rights other than the right to confront. (Br. 29-35). Craig's argument in this regard constitutes little more than a veiled attempt to raise issues not presented for the Maryland courts' consideration in this case, and thus it is not properly before the Court. *See Adickes v. S.H. Kress & Co.*, 398 U.S. at 147 n.2. Additionally, Craig's contentions ignore the facts of this case. Craig was not deprived of her right to counsel: she had two lawyers representing her at trial. (J.A. 88). Craig also was not denied access to counsel. While the children testified, Craig sat in the courtroom with one of her two attorneys. (J.A. 88). As to her claim that the

telephone hook-up between the courtroom and the judge's chambers did not work properly, Craig primarily supports this contention by pointing to problems that arose while Brooke Etze was being examined for competency. (Br. 31-33). Under *Kentucky v. Stincer*, 482 U.S. at 744, Craig had no constitutional right to participate in the competency hearing. And, Craig fails to mention that, when she complained about an inability to reach counsel in the judge's chambers during Brooke's cross-examination testimony, the court allowed Craig to reopen cross-examination to ask additional questions. (J.A. 141-49).[5]

Craig's contention that she was denied her right to a jury is equally unfounded. The jury was able to assess each child's demeanor via the two television monitors in the courtroom. (J.A. 89). In this respect, Craig's jury was in a superior position to a jury that is asked to consider hearsay evidence of a declarant it never sees. Nor did the procedure here lessen the jury's fact-finding role. The trial court expressly instructed the jury that Craig was presumed innocent and that it was within the jury's sole province to weigh the evidence and assess the witnesses' credibility. (Tr. 4/1/87, at 3-6).

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[5] Interestingly, in *Wildermuth v. State*, 310 Md. 496, 525-26, 530 A.2d 275, 289-90 (1987), a case upon which Craig relies extensively to support her third and fourth arguments, the Maryland Court of Appeals determined that Section 9-102 does not unconstitutionally infringe upon a defendant's right to counsel. And, although the Court of Appeals' decision in the instant case did not address the issue, the Maryland Court of Special Appeals rejected the notion that Craig was harmed by any defects in the telephone hook-up system. (Pet. App. 58a-60a).

In sum, as stated at pages 21 to 27 of its principal brief, the State of Maryland has legitimate and compelling interests in protecting victims of child abuse.[6] The State's one-way closed-circuit television procedure constitutes a proper response to the host of problems that attend child abuse prosecutions. And, because the need for the procedure was amply demonstrated, see Argument III, *infra*, there has been no violation of Craig's right of confrontation.

III. THE USE OF ONE-WAY CLOSED-CIRCUIT TELEVISION BY THE CHILD VICTIMS WAS BASED ON APPROPRIATE CASE-SPECIFIC FINDINGS OF NECESSITY.

Craig's third argument is based on the notion that the trial court did not determine that it was Craig's physical presence that would cause the child witnesses to suffer serious emotional distress such that they would be incapable of reasonably communicating. (Br. 35-40). Craig is mistaken.

The evidence considered by the court directly focused on the effect Craig's physical presence would have on the children. (J.A. 37-46, 52-59). Merely be-

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[6] Maryland's interest in protecting child victims is shared by a majority of the States. *See generally* Brief for State of Florida as *Amicus Curiae*. Thirty-five states, as well as the Commonwealth of Puerto Rico and the U.S. Virgin Islands, joined Florida's brief. Given the large number of children who are victims of abuse, this wide interest is not surprising. Since Maryland's principal brief was filed, a new study reflecting updated statistics regarding reported incidents of child abuse and neglect has been published. In 1989, 2.4 million reports were filed, approximately 10% more than were filed in 1988. *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual Fifty State Survey* 2 (National Committee for Prevention of Child Abuse, March, 1990).

cause the trial court couched its ruling in terms of Section 9-102's actual language does not mean that the court did not address the consequences of the children's testifying in front of Craig. Although this Court is not bound by appellate fact-finding, *Beck v. Ohio*, 379 U.S. 89, 93 (1964), the Court of Special Appeals of Maryland's conclusion in this regard is compelling:

> Given the context of the issue, . . . —the State's motion, the evidence given by Ms. Burke and Dr. Sweeney, and the argument of counsel—it is apparent that the court's concern was not so much forcing the children to testify in open court as requiring them to testify in the direct presence of Ms. Craig.

(Pet. App. 57a-58a).

Additionally, the trial court here had the unique opportunity, after trial and after the Maryland Court of Appeals had filed its decision in *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987), to reassess its decision regarding the propriety of allowing the closed-circuit procedure. (J.A. 274-93). It did so after Craig's counsel filed a motion for new trial based on *Wildermuth*. (J.A. 272-73). In *Wildermuth*, which the trial court read several times (J.A. 292), Maryland's high court determined that a Section 9-102 finding of inability to communicate reasonably "is tantamount to a finding of unavailability in the *Roberts* sense, and meets the necessity prong of the *Roberts* test." 310 Md. at 519, 530 A.2d at 286. In this regard, the *Wildermuth* decision foreshadowed the standard advocated by the concurring Justices in *Coy*, 108 S.Ct. at 2805, and suggested by the *Coy* majority, *id.* at

2802-03. For Craig to suggest then that the trial court ruled as it did without the benefit of *Wildermuth* (Br. 37) overlooks that the trial court thoroughly considered *Wildermuth* when Craig's own attorneys brought that case to the court's attention.

Significantly, Craig expends little effort arguing that the expert testimony offered at the pre-trial hearing does not support findings that use of the closed-circuit television procedure was necessary. Indeed, any attempt to do so would prove futile. Mary Burke's testimony that Brooke Etze would probably stop talking and curl up if forced to testify in Craig's presence and that Brooke perceived her life and the lives of her parents as having been threatened by Craig clearly supports the determination that Brooke needed the special protection of closed-circuit television. (J.A. 39, 44). To like effect is Ms. Burke's testimony that it was necessary to remove the threatening agent, Craig, in order to maximize Justin Peeples's ability to communicate. (J.A. 41). Similarly, Ms. Burke's testimony that Jessie Sue Smith's fear of facing Craig would cause Jessie not to share information with the jury and would cause Jessie to regress amply supports the finding that that child needed the special protection of Section 9-102. (J.A. 43). And, Dr. Sweeney's testimony that Drew Woodbury's ability to communicate would be very impaired if he were to testify in an open court in the presence of Craig likewise demonstrates the propriety of allowing this child to testify via closed-circuit television. (J.A. 54).

The State of Maryland suggests that there are a number of relevant factors, any one of which might justify use of a child-protective device such as one-

way closed-circuit television. These factors include: (1) the manner in which the offense was committed; (2) whether a deadly weapon or dangerous instrument was used; (3) whether the offense was an isolated incident or part of an ongoing course of conduct; (4) the victim's age; (5) the victim's psychological maturity; (6) the desires of the parents and/or the victim; (7) whether the accused occupied a position of authority with respect to the victim; and (8) whether the victim has been threatened. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608 (suggesting similar factors could justify courtroom closure).

Here, in addition to the expert testimony discussed above, the trial court had before it, and implicitly considered, all of these factors. By virtue of its opportunity to rule on the issue both before and after trial, the court knew the following: (1) Craig was charged with having physically and sexually abused the children; (2) a stick and screwdriver were used to commit the abuse; (3) the abuse occurred over an extended period of time; (4) the children were only four, five, and six years old; (5) the children were psychologically immature; (6) the children had expressed desires not to see Craig; (7) Craig had supervised and taught the children at her day-care center; and (8) Craig had threatened to harm the children and their families.

In sum, the trial court's decision in this case was properly focused and amply supported. There was no need for the trial court to have observed the children in Craig's physical presence before allowing them to testify as they did.

IV. THE COURT OF APPEALS' DECISION DOES NOT REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Under the standard established by *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983), this Court will not review a state court judgment if it rests on an adequate and independent state ground. Stated otherwise, if a state court judgment or opinion contains a plain statement that federal law is being used only for guidance, and does not compel the court's result, this Court will refuse to review the state court decision, except in certain limited circumstances. *Id.* at 1041 & n.6; *accord Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986). Here, rather than containing the requisite plain statement that it rests on an adequate and independent state ground, the Court of Appeals' decision contains a plain statement that it is compelled by federal law, particularly this Court's decision in *Coy v. Iowa*. At the very outset of its opinion, the Court of Appeals stated: "[W]e reverse because, as we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." (Pet. App. 3a). Later in its opinion, the Court of Appeals said: "[W]e believe *Coy* requires us to limit the use of the exception embodied in § 9-102 to circumstances even narrower than those we delineated in *Wildermuth*." (Pet. App. 12a).

Furthermore, although the Court of Appeals' decision contains references to Article 21 of the Maryland Declaration of Rights,[7] which provision is

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[7] Article 21 provides in pertinent part: "That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . ."

virtually identical to the Sixth Amendment's Confrontation Clause, the following typifies the court's use of Article 21: "Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and Article 21 confrontation purposes, 'in the courtroom in the presence of the defendant.' " (Pet. App. 16a). Such use of Article 21 "in direct conjunction with the United States Constitution" is akin to the circumstances that confronted this Court in *New York v. Class*, 475 U.S. 106, 109 (1986), a case in which the Court rejected the defendant's claim that jurisdiction should be declined.

Finally, as Craig acknowledges (Br. 45), the Maryland Court of Appeals adheres to the rule that "[o]rdinarily, courts do not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which to dispose of the case, and do not decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Employment Security Administration v. Baltimore Lutheran High School Assoc.*, 291 Md. 750, 754 n.2, 436 A.2d 481, 484 n.2 (1981) (citing *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). Thus, as it did in *New York v. Class*, 475 U.S. at 110, this Court should infer that the Maryland Court of Appeals believed that any state statutory ground was insufficient to resolve the instant case.

In sum, Craig's final argument, which she initially raised in her brief in opposition to the State's petition for writ of certiorari (Br. Opp. to Pet. 2-8), has no more merit now than it did when first presented to this Court. Accordingly, the contention should be rejected and the merits of this case considered.

CONCLUSION

For the reasons stated herein and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1989

STATE OF MARYLAND,

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SANDRA ANN CRAIG,

Respondent.

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Council for People Against Child Abuse

QUESTION PRESENTED

Does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before one-way closed circuit television proceedings may be invoked, in the context in which individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to criminal cross-examination at trial?

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INTEREST OF AMICI CURIAE

This brief, in support of the Brief for Petitioner, State of Maryland, is submitted on behalf of People Against Child Abuse, the Association for Childcare Excellence, the National Center for Missing and Exploited Children and Rosie's Patrol. The written consent of the parties has been obtained and submitted to the Clerk.

People Against Child Abuse ("PACA") is a private, nonprofit, state-wide organization dedicated to the prevention and elimination of child abuse and neglect in the State of Maryland. PACA is the Maryland chapter of the National Committee for the Prevention of Child Abuse. PACA attempts to accomplish its goals through legislative efforts, conferences on victims' rights, establishing support groups and community education.

The Association for Childcare Excellence ("ACE") is a Maryland organization of parents and professionals dedicated to promoting safe and affordable childcare for the citizens of Maryland. ACE advocates for childcare licensing standards which will produce safe and enriching environments for children. One of ACE's primary goals is to increase protection for children in day care.

The National Center for Missing and Exploited Children ("NCMEC") is a nonprofit corporation with the national goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

Rosie's Patrol is a community-based volunteer organization founded as a tribute to a ten year-old girl who was abducted from her neighborhood and later murdered in July 1989. Rosie's Patrol volunteers work to help prevent the re-occurrence of such crimes and other offenses which make children victims.

The *amici* have an interest in this matter because they are child advocacy groups dedicated to advancing

the rights and interests of victims of child abuse. The *amici* are convinced that as a result of the Maryland Court of Appeals' erroneous interpretation of this Court's decision in *Coy v. Iowa*, 108 S. Ct. 2798 (1988), and the Sixth Amendment to the United States Constitution, child abuse victims will be unnecessarily traumatized and many perpetrators of child abuse will go unpunished.

The *amici*, therefore, submit this brief in support of the Petitioner, the State of Maryland, and request that this Court clarify the constitutional protections provided to alleged perpetrators of child abuse by the Sixth Amendment to the United States Constitution, in light of its holding in *Coy*.

SUMMARY OF ARGUMENT

The Maryland Court of Appeals in *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 834 (1990), reversed the conviction of Sandra Ann Craig by a jury of child abuse, first and second degree sexual offenses, perverted sexual practice, and assault and battery on a child who had attended her day care center. At the trial, the victim, then a girl seven years-old, as well as two five year-old boys and a four year-old girl, who the state alleged also had been abused by Craig at her day care center, testified via one-way closed circuit television. This procedure is authorized by Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989) so long as the trial judge first "determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." The trial judge in *Craig* relied

on testimony by treating therapists as to each child's inability to communicate in the courtroom.

Noting *Coy*'s insistence on the defendant's right to a face-to-face confrontation with the accuser, Maryland's highest court found that the threshold showing of necessity for use of the one-way closed circuit television procedure in *Craig* was insufficient. The court held that a judge may not rely solely on expert testimony to make a finding of witness unavailability under the Maryland statute, but instead must observe the child being questioned face-to-face with the defendant twice, once in person and once via two-way closed circuit television. Only after the judge observes that the child is in such emotional distress from the face-to-face confrontations as to be unable to reasonably communicate, may the Maryland closed circuit protective procedure be used.

Forcing every child abuse victim to face the accused hampers two compelling state interests: protection of children and the prosecution of crimes. There is general agreement that face-to-face confrontation of many child abuse victims with their abusers in court retraumatizes the victims, who often have been repeatedly abused as well as threatened into silence. The emotional distress of such child victims when confronting defendants in the traditional courtroom setting makes them less available as witnesses. This is because parents may refuse to allow children to participate in traumatizing proceedings. Moreover, the ability of the child victims to testify accurately and completely is undermined by the courtroom stress. Since often the only witness in a child abuse case is the child, successful prosecutions are, consequently, thwarted.

This Court's decisions indicate that the Constitution does not confer on every accused the right to a strict face-to-face confrontation with his accuser. Rather, the accused's Sixth Amendment rights incorporate a concept of balancing in the interests of justice. Where compelling state interests are involved, as in *Craig*, minimal infringement on the defendant's confrontation right is justified.

Thus, the Sixth Amendment is not violated in a child abuse prosecution where the judge has made an individualized determination of the necessity for allowing the child to testify via one-way closed circuit television, and the child does so under oath, is seen by the jury and is subject to thorough cross-examination.

ARGUMENT

I. BECAUSE OF CHILD ABUSE VICTIMS' UNIQUE VULNERABILITY, A STRICT FACE-TO-FACE CONFRONTATION REQUIREMENT DAMAGES CHILD WITNESSES AND HAMPERS THE PROSECUTION OF CHILD ABUSE.

The instant case raises squarely the question of how to balance the accused's Sixth Amendment confrontation right against the state's interests in protecting children and prosecuting child abuse. In attempting to comply with this Court's ruling in *Coy*, the Maryland Court of Appeals requires the child victim to face the accused twice and exhibit twice the statutorily requisite "severe emotional distress" so as to be demonstrably unable to proceed *before* the child is entitled at trial to the protection intended by the Maryland one-way closed circuit television statute.

This procedure inflicts on the child witness the very trauma the statute is meant to alleviate.[1]

In addition, as the opinion of the Maryland Court of Special Appeals recognized:

> [I]f the child victim is . . . so 'traumatized' by a face-to-face confrontation as to be unable to 'reasonably communicate'—the truth of the matter might never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation. . . .

Craig v. State, 76 Md. App. 250, 283, 544 A.2d 784, 800 (1988), *rev'd*, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 835 (1990). Thus, the insistence on a strict face-to-face confrontation of the abused child by the defendant, in every case, in addition to re-traumatizing the child, will likely cause the rate of child sexual abuse prosecutions, already low,[2] to drop further.

[1] For tactical reasons, prosecutors would not consider using closed circuit television unless they were dealing with a child who had been so traumatized that the child could not communicate effectively in open court, before the jury, in the defendant's presence. *See* Myers, *Legal Response to Child Abuse: In The Best Interest of Children?*, 24 J. Fam. L. 149, 240 (1985-86). Neither responsible prosecutors nor parents will be willing to put such a traumatized child through the ordeal fashioned by the Maryland Court of Appeals, nor, after the ordeal, will this thrice-traumatized child be likely to be able to proceed via one-way closed circuit television. Thus, the holding of the Court of Appeals virtually guarantees some abusers immunity from prosecution.

[2] It is estimated that only 24% of all cases nationwide result in criminal actions. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. Sch. Hum. Rts. Ann. 441, 446 (1986). A recent national study concluded that only 30% of all substantiated day care child sexual abuse cases proceed to trial. Finkelhor, Williams and Burns, *Nursery Crimes: Sexual Abuse in Day Care* 217 (1988).

Responsible parents may forego reporting the crime or subsequently refuse to cooperate with the state if they know that their children will be further traumatized by a trial in which they must confront the accused.[3] Cases will also be abandoned or go unprosecuted because of truthful child victims' refusals to testify, inability to give complete or accurate accounts when confronting the alleged abuser in court proceedings and false recantations out of fear.

Even if the crime is detected and prosecuted, loss of the child's testimony because of insistence on face-to-face confrontation would mean the denial to the jury of the most pivotal, probative part of the case. It surely better serves the interests of truth-finding and the securing of justice to recognize the child victim's unique vulnerability and to have the child's testimony presented, as in *Craig*, live, at trial, under oath, and subject to full cross-examination in the view of the jury via closed circuit television.

A. It Is Generally Agreed that Testifying in the Courtroom Re-Traumatizes Child Abuse Victims.

There is widespread agreement that ordinary judicial proceedings are extremely stressful for many

[3] Bainor, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 Fordham L. Rev. 995, 997, 1000 (1985). In the Finkelhor day care study, the victim or parents withdrew cooperation in 12% of the cases after arrests were made because of concern about possible trauma from court proceedings. Finkelhor, Williams and Burns at 219-20.

child abuse victims.[4] Those proceedings were designed by adults for the trial of adults by presentation of adult witnesses before adult jurors and judges. Yet, as many as one-third of the victims of child sexual abuse are under age six.[5]

Components of legal proceedings, such as facing the accused and the formal courtroom atmosphere, are capable of putting a child victim under prolonged mental stress and endangering the child's emotional equilibrium.[6] Courtroom testimony is associated with increased behavioral disturbances in children.[7] Specifically, researchers who have compared the adjustment of child victims involved in court proceedings with that of child victims who did not go to court found that children who testified showed greater disturbance than non-testifiers.[8]

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[4] *See, e.g.*, Goodman and Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181, 203 (1985); Whitcomb, Shapiro, and Stellwagen, *When The Victim Is A Child: Issues For Judges And Prosecutors* 17-19 (1985).

[5] Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dick. L. Rev. 645, 647 (1985). In day care sexual abuse cases, the largest number of victims are ages three and four. Finkelhor, Williams and Burns at 74-75.

[6] Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1968-69).

[7] *See, e.g.*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 New Eng. L. Rev. 643, 649 (1982).

[8] Goodman, Pyle-Taub, Jones, *et al.*, *Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* 5-9, 104 (1989) (unpublished paper).

Courts and judges have also recognized the trauma experienced by child victims caught in the criminal prosecution system. In a 1974 study, 84% of the judges surveyed believed that children who testified in court in sexual abuse cases were traumatized as a result.[9] As the Court concluded in *State v. Sheppard*, 197 N.J. Super. 411, 431, 484 A.2d 1330, 1342 (1984): "[C]hildren who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse."

B. Face-to-Face Confrontation with the Accused Is the Single Most Frightening Courtroom Experience for Child Abuse Victims.

Child abuse is one of the most difficult crimes to detect and prosecute precisely because, most often, the only witness is the child. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Thus, any procedure which contributes to a child's unavailability as a witness in a case undermines successful prosecution. There is evidence that forcing every child abuse victim to face the alleged abuser in court will make children less available as witnesses.[10]

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[9] Lusk and Waterman, "Effects of Sexual Abuse on Children," in *Sexual Abuse of Young Children* 109 (1986) (citing Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 Judicature 303 (1974)).

[10] As many as 90% of the child abuse cases in one prosecutor's office were dismissed "as a result of problems attending the testimony of children who could not deal with the prospect of facing fathers, step-fathers, relatives and strangers in a courtroom setting." *State v. Sheppard*, 197 N.J. Super. at 417, 484 A.2d at 1333. *See also*, Comment, *The Young Victim As Witness For The Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 721-22 (1985) (cases reported dropped because the child could not testify at trial include one where a three year-old boy had gonorrhea of the mouth, penis, and rectum).

Research has identified the face-to-face confrontation with the accused in the courtroom as one of the most traumatizing post-abuse experiences for young victims. When investigators from the National Institute of Justice asked professionals in four United States cities what feature of the criminal justice system troubled children, the most frequently mentioned fear was facing the defendant. This fear was cited by all respondents in the study, including police, social workers, advocates, therapists, doctors and judges. As the authors concluded: "That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming."[11]

Gail Goodman and others investigating the emotional effects on child sexual abuse victims of testifying in criminal court discovered that children's negative responses to testifying in court are most pronounced in relation to having to face the defendant.[12] Children who were most frightened of

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[11] Whitcomb, Shapiro, and Stellwagen at 17-18.

[12] Goodman, Jones, Pyle-Taub, *et al.*, *Children in Court: The Emotional Effects of Criminal Court Involvement* 5 (unpublished paper presented at the 97th American Psychological Association Convention, New Orleans, Louisiana, August 1989) (hereinafter cited as "*Children in Court*"). The children in the study "expressed fears that he [97% of the defendants were male] would make faces at them, that he would plan revenge, and that they would be so frightened that they would go blank and not be able to answer questions. Indeed one young child walked into the courtroom, looked around, saw the audience and the defendant and ran out. She could not be convinced to return." Children who did testify in open court were somewhat relieved after the experience, but still disturbed about the confrontation with the defendant. *Id.*

the defendant suffered continued post-trial emotional disturbance.[13]

Truthful child victims' fears of defendants in child abuse cases stem from the dynamics of the abuse itself, which greatly magnifies the emotional distress attendant on testifying in open court. The intimidation that the child experiences when forced to confront the abuser is the cumulative result of the abuse, as well as the threats which have been made to silence the child. In most child abuse cases, the abuser is someone known to the child, usually in a relationship of trust and confidence.[14] Because of this on-going relationship, the abused child frequently has suffered from the abusive acts not once but repeatedly over an extended period of time and has been seriously threatened by the abuser in order to intimidate the child into silence.[15] Commonly, children are told that if they tell, their parents won't love them anymore,

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[13] *Id.* at 7.

[14] In the Goodman study of 218 criminal child abuse cases in the Denver area, only 6% of the defendants were strangers to the child victims. About 23% were fathers or step-fathers. The most frequent category included babysitters, teachers, church officials, and boy scout leaders. *Children in Court* at 4.

Defense attorneys also exacerbate children's courtroom trauma from face-to-face confrontation. It is common practice for defense attorneys to try to force child victims to look at the accused by standing beside the defendant during cross-examination. Bowes, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. Juv. L. 31, 34 (1983).

[15] *See* MacFarlane, "Sexual Abuse of Children," in *The Victimization of Women* 81 (1978).

their parents will die, they will be killed, or they will get in a lot of trouble. *See, e.g., State v. Sheppard*, 197 N.J. Super. at 415-16, 484 A.2d at 1332. Children fear that the molester may carry out the threats he made to them to ensure nondisclosure.[16] Furthermore, children do not understand that because they are in a courtroom, the proximity of the accused poses no threat. The child, in fact, may believe that the defendant is likely to attack him or her right in the courtroom.[17]

In day care abuse cases such as *Craig*, researchers have concluded that children

> were more threatened, coerced and terrorized than children in many other kinds of sexual abuse. . . (T)he day care abuse situation seemed to attract more perpetrators whose motives involved sadism and terrorizing as an end in itself. In a typical sexual-abuse case outside of day care, a father may gain silence from his daughter by pointing out to her that he will go to jail if she tells. But the threats used on three-year-olds in day care were often of a much more monstrous quality, because perpetrators could

[16] Berliner, "Counseling and Follow-Up Interaction for the Sexually Abused Child," in *Management of the Physically and Emotionally Abused* 282 (1982).

[17] Goodman and Hegelson at 203. In one case involving a five-year-old girl, the defendant had allegedly threatened to kill the child and her mother if they reported the abuse. The child emerged from the courtroom with great relief and ran and told her mother: "Mom, he didn't give me the evil eye. I think he's just going to kill you and not me." *Children in Court* at 5-6.

> make outrageous claims that the three-year-olds were not knowledgeable enough to dismiss. The fear and terror that many of the children suffered as a result of being threatened and coerced seem to be a special part of the situation of day care abuse.

Finkelhor, Williams and Burns at 96.[18]

During the *Craig* pre-trial hearing on the State's motion to invoke the Maryland one-way closed circuit television procedure, therapists treating the children testified as to threats made by Mrs. Craig. Mary Burke, the therapist for the child victim in the case, explained that the child perceived that she was threatened by the day care operator and that she truly believed that her life and the lives of members of her family and the household pet were in jeopardy. (E. 75-76). Another child witness at the trial, who had also allegedly been abused by Mrs. Craig, was said to believe the defendant capable and willing to carry

[18] The authors studied cases of sexual abuse in day care nationwide occurring from 1983-1985. In 270 facilities where substantiated abuse had occurred, there were a total of 1,639 victimized children. *Id.* at 17. The authors found that "[s]ome kind of physical force—ranging from holding a child down, to tying her up, to hanging a child up by his heels—was present in 31% of all cases, and the threat of force in 42%." *Id.* at 93.

To prevent disclosures to parents when the children were outside the authority of the day care abuser, children were told that their parents or their pets would die or go to jail if they told. Abusers sometimes killed animals and invoked supernatural powers to prove to the children that they would punish them if they disclosed. "To such young children, even threats that might appear innocuous to adults may have been truly terrorizing. Children were threatened with snakes, spiders, wild animals and monsters." *Id.* at 95.

out threats against herself, her parents, and her sibling. (E. 80).

C. Confrontation with the Accused in the Courtroom Interferes with the Child's Ability to Testify.

Although this Court has often stated that confrontation ensures the integrity of the fact-finding process, *see, e.g., Coy*, 108 S. Ct. at 2802; *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965), the contrary is more often the case with child victim-witnesses. The stress-provoking factors of traditional criminal proceedings interfere with the child's ability to testify accurately and completely. "The physical presence of a defendant who is a threatening figure in a child's life, or even a non-threatening defendant about whom a child feels badly for having disclosed sexual secrets, along with the stigmatizing and guilt-provoking presence of the general public often constitute the primary impediments to a child's ability to testify about sexual abuse."[19]

Intimidation can interfere with the child's memory during the trial. Psychological research has shown that stress and intimidation can decrease a person's ability and willingness to recall information. The Yerkes-Dodson Law, a generally accepted psychological theory which explains the effects of stress on memory, posits that as stress increases, attention narrows and relevant information is excluded from the memory. The stress surrounding the sexual abuse itself may increase a child's inability to remember.[20]

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[19] MacFarlane, *Diagnostic Evaluations and The Use of Videotape in Child Sexual Abuse Cases*, 40 U. Miami L. Rev. 135, 149 (1985).

[20] *See* Thumann, *Admitting Videotaped Testimony in Cases Involving Sexual Abuse of a Minor*, 22 Colum. J. L. & Soc. Prob. 489, 503 (1989).

This effect may be compounded by stress-inducing trial practices, such as face-to-face confrontation with the abuser. As a prosecutor recounted in *State v. Sheppard*: "Children who did testify . . . frequently 'forgot' details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer." 197 N.J. Super. at 417, 484 A.2d at 1333.

Researchers have confirmed that direct confrontation with a defendant has a detrimental impact on the child's ability to testify. In the Goodman study there was a direct correlation between children who were afraid of testifying in front of the defendant and their ability to answer prosecutors' questions. The more frightened the child was of the defendant, the fewer of the prosecutors' questions the children could answer and the less complete their answers.[21]

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[21] Goodman, Pyle-Taub, Jones, *et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* at 90-91, 109. *Accord* Dent and Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses," in *Psychology, Law and Legal Processes* 195, 200-03 (1979). Benedek and Schetky, *The Child As A Witness*, 37 Hospital and Community Psychiatry 1225, 1227 (Dec. 1986).

One empirical study indicates that children questioned in a small room respond to questions more accurately and completely than children questioned in a traditional courtroom. In the study, children questioned in the courtroom setting exhibited anxiety and were generally unable or unwilling to make an in-person identification of a defendant in the courtroom. Hill and Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 814-16 (1987).

As the Maryland Court of Special Appeals remarked in regard to the use of the Maryland closed circuit statute:

> Keeping in mind the threshold requirement in § 9-102 [a child could not 'reasonably communicate' in the defendant's presence], what is to be gained from forcing a child victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child, rather than any meaningful evidence—*in*culpatory or *ex*culpatory?

Craig v. State, 76 Md.App. at 283, 544 A.2d at 800.

Placing the child in a stressful courtroom situation may also make the child more susceptible to suggestion; information retrieval failures predict heightened suggestibility and false recantations may thereby be produced.[22] In other words, the intimidating environment of the courtroom and the physical proximity to the alleged abuser causes some child victims to take back initial truthful statements.[23] Thus, the traditional lore that a witness's veracity increases when *facing* the defendant is simply wrong when applied to child abuse victims. *Contra Coy*, 108 S. Ct. at 2802.

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[22] Goodman and Hegelson at 203-04. Recantations, or retracting the original report, are a recognized phenomenon of the "child sexual abuse syndrome." *See* Summit, *The Child Sexual Abuse Accomodation Syndrome*, 7 Child Abuse and Neglect 177 (1983).

[23] Berliner, Canfield-Blick and Bulkley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in National Legal Resource Center for Child Advocacy and Protection, ABA, *Child Sexual Abuse and the Law* 172 (1983).

Courts have recognized that reduction of the child's stress in testifying aids the judicial truth-determining function. In allowing the use of one-way closed circuit testimony subject to cross-examination, the New Jersey Superior Court relied on the opinion of a recognized expert in forensic psychology to the effect that the avoidance of an in-court appearance through the use of video equipment would improve the accuracy of the child's testimony. The psychologist indicated that the courtroom atmosphere was more likely to produce *inaccurate* testimony, because the child would become fearful, guilty, anxious and traumatized when confronting an abuser, particularly a relative. The child's feelings would mitigate the truth. "The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of testimony." *State v. Sheppard*, 197 N.J. Super. at 416, 484 A.2d at 1332. *See also State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App.), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), *cert. granted, judgment vacated and case remanded for further consideration in light of Coy v. Iowa*, 108 S. Ct. 2890, *aff'd on remand*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), *cert. denied*, 109 S. Ct. 1572 (1989); *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (1982).

Therefore, the state's public policy interests in protecting children and prosecuting child abuse cannot be met if every child abuse victim is forced into a face-to-face confrontation with the defendant. Traditional courtroom procedures designed to enhance the truth-determining process with adults may actually impede the pursuit of truth with vulnerable child victims while re-traumatizing the child. Successful pros-

ecution and, thus, deterrence of the crime of child abuse will be hampered by a strict adherence to physical confrontation with the defendant.

II. THE CONFRONTATION RIGHT, LIKE MANY OTHER CONSTITUTIONAL RIGHTS, IS NOT ABSOLUTE, BUT INCORPORATES A CONCEPT OF BALANCING IN THE INTERESTS OF JUSTICE.

A. America's Criminal System Justice Reflects a Balancing of Society's Interest in Effective Prosecution of Crimes and its Interest in Ensuring that Innocent Persons Not Be Convicted.

America's system of criminal justice, including its rules of evidence, is designed to enhance the integrity of the fact-finding process so as to lead to a just result. Two fundamental competing interests have been balanced in this effort: (1) punishment (and thereby deterrence of) crimes and (2) protection of innocent individuals wrongly accused. The fabric of our criminal procedure is woven with threads from each.

For example, the accused is protected by the imposition on the prosecution of a more onerous burden of persuasion than exists in civil cases: guilt must be proved beyond a reasonable doubt. But even this standard is not as protective of the accused as it could be, since we do not require guilt to be proved beyond *any* doubt. The standard chosen is one of compromise, and it reflects a balancing of the dual interests of justice.

B. The Confrontation Right Was Included in the Constitution as Only One Specific of Due Process to Ensure Fair Process to a Criminal Defendant.

In addition to including the Due Process Clause in the Fifth Amendment, the authors of the Bill of

Rights listed several specific protections in the Sixth Amendment to guard against the repetition in America of injustices against accused persons in the not so distant history of England.

In 1603, Sir Walter Raleigh had been convicted of treason and executed on the strength of two out-of-court statements by persons who did not testify at trial. One was an unnamed "Portuguese gentleman." J.G. Phillimore, *History and Principles of the Law of Evidence* 157 (1985). The other was Lord Cobham, Raleigh's alleged coconspirator who had made a confession while being held prisoner—and no doubt tortured—in the Tower of London. (To make matters worse, Cobham apparently also had recanted the statement, but then had recanted the recantation.)

Gross injustices such as Raleigh's execution led to the inclusion in the Sixth Amendment of the right of the accused "to be confronted with the witnesses against him" so as to be able to cross-examine each and test his or her perception, memory, and sincerity, while the fact-finder could see the witness's demeanor. As this Court has stated:

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometime admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his

> demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

C. The Confrontation Right, like Many Other Constitutional Rights, Is Not Absolute but Must Be Evaluated in Light of the Values It Seeks to Protect: Fair Process, the Disclosure of the Truth, and the Enhancement of Justice.

1. Such an Evaluation Requires a Balancing of Competing Interests, such as this Court Has Made with Regard to Other Constitutional Rights in Addition to the Confrontation Right.

On many occasions this Court has recognized that constitutional "rights" are often not absolute. For example, although the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed," this Court has never held that the federal government may not reasonably regulate that right. *See, e.g., Lewis v. United States*, 445 U.S. 55 (1980) (upholding federal prohibition of gun ownership by convicted felons when the firearm has been used in interstate commerce); *United States v. Miller*, 307 U.S. 174 (1939) (sustaining federal registration of sawed-off shotguns). As a further example, the state's interest in the welfare of children may circumscribe limits on the Fifth Amendment privilege against self-incrimination. *See Baltimore Dep't of Social Servs. v. Bouknight*, No. 88-1182 (U.S. February 20, 1990) (a mother may not invoke the privilege to resist a court order to produce her missing child).

Similarly, Sixth Amendment rights other than the confrontation right, which on their face might appear to be absolute, have not been so interpreted. For

example, the accused's right to a "public trial" must sometimes give way, at least in part, to countervailing considerations. *Waller v. Georgia*, 467 U.S. 39 (1984) (recognizing that the right to an open trial is not absolute).

The accused's Sixth Amendment right to a jury trial also has been subject to balancing. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth Amendment does not require jury unananimity; 11 to 1 and 10 to 2 jury convictions serve equally well the interest of the defendant in having the judgment of his or her peers interposed between himself or herself and the officers of the state who prosecute and judge him or her).

The accused's Sixth Amendment right to "compulsory process for obtaining witnesses in his favor" has sometimes had to give way to a particular privilege. For example, this Court's decisions construing the informer's privilege balance the accused's need to know the identity of the informer in order to make a defense against the government's interest in protecting the flow of information to it. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 62 (1957) ("We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for *balancing* the public interest in protecting the flow of information [to law enforcement officials] against the individual's right to prepare his defense.") (emphasis added).[24]

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[24] *See generally* White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. Crim. L. & Criminology 377 (1989) (suggesting that greater deference should be given to privileges which are primarily con-

This Court has also engaged in balancing of competing interests against the Sixth Amendment right to counsel. *See Caplin v. Drysdale*, 109 S.Ct. 2646 (1989) (upholding seizure of funds to be used for attorney's fees in narcotics case).

2. This Court Has Historically Performed such a Balancing in its Decisions Construing the Confrontation Clause.

This Court repeatedly has recognized that the Sixth Amendment right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. at 243; *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). *See also Coy v. Iowa*, 108 S.Ct. at 2803 (leaving the question for "another day").

Even where the witness was unavailable for trial, the admission of his or her out-of-court statement against the accused has been upheld when that statement bore circumstantial guarantees of reliability, so that its *exclusion* would hamper accurate fact-finding. *See, e.g., Ohio v. Roberts*, 448 U.S. at 63. (prior testimony admitted; literal interpretation of Confrontation Clause rejected as "unintended and too extreme;" hearsay may be admitted against accused if the state has made showing of necessity, as by unavailability of the hearsay declarant, and statement bears sufficient indicia of reliability); *Mattox v. United States*, 156 U.S. 237 (hearsay exception for prior testimony). In these cases, of course, the jury had *no* opportunity

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cerned with a victim's privacy rather than those which are solely designed to assist the government).

to observe the demeanor of the out-of-court declarant. *See also Bourjaily v. United States*, 483 U.S. 171 (1987) (admission under Fed. R. Evid. 801(d)(2)(E) of out-of-court statement of an unavailable coconspirator does not violate the accused's confrontation right; coconspirator hearsay exception (nonhearsay under Fed. R. Evid.) is firmly enough rooted in our jurisprudence that, under *Ohio v. Roberts*, 448 U.S. 56, a court need not independently inquire into the reliability of such statements).

Even unavailability of the declarant is not always constitutionally mandated. *E.g., United States v. Inadi*, 475 U.S. 387 (1987) (coconspirator need not be shown to be unavailable to testify before coconspirator's statement made during and in furtherance of the conspiracy may be admitted against defendant).

This Court's cases also repeatedly have emphasized the opportunity for effective cross-examination as central to the confrontation right. *E.g., Kentucky v. Stincer*, 482 U.S. at 730; *Lee v. Illinois*, 476 U.S. 530, 540-41 (1986); *Douglas v. Alabama*, 380 U.S. at 418. *See Olden v. Kentucky*, 109 S.Ct. 180 (1988) (per curiam) (reversible error, and deprivation of right of confrontation, to disallow defense's questioning of rape victim about her cohabitation with person to whom she reported rape, to show her motive to lie when she had consented to intercourse with defendant); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (Confrontation Clause was not violated when expert witness failed to recall the basis of his opinion, because the Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish").

III. ADVANCEMENT OF COMPELLING STATE INTERESTS IN PROTECTING CHILD VICTIMS FROM FURTHER UNNECESSARY TRAUMA AND IN PROSECUTING CHILD ABUSE JUSTIFIES THE MINIMAL INFRINGEMENT HERE OF AN ACCUSED'S CONFRONTATION RIGHT.

The state has a *parens patriae* interest in protecting children from harm. As this Court recognized in *Prince v. Massachusetts*, 321 U.S. 158 (1944), "[d]emocratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Id.* at 168. In yet another case, *New York v. Ferber*, 458 U.S. 747 (1982), this Court identified prevention of sexual exploitation and abuse of children as constituting a governmental objective of surpassing importance. *Id.* at 757. It also indicated that it had sustained legislation aimed at protecting the physical and emotional health of children even when the laws operated in the area of constitutionally protected rights. *Id.* at 756.

This Court also addressed these interests in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) when it stated that, "[t]he state interests asserted to support Section 16A [the mandatory trial closure rule struck down] though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 607.[25] In *Globe Newspapers* this Court concluded

[25] The Court took special note of factors articulated by the Massachusetts Supreme Judicial Court in an earlier remand of

that those interests were compelling and held that they could be addressed by requiring a trial court to determine on a case-by-case basis whether the special child protection procedure of closing the courtroom was necessary. *Id.* at 609.

The State's compelling interest in protecting child sexual abuse victims from further unnecessary trauma, coupled with the need to encourage the flow of information about crimes to law enforcement officials, *see, e.g., Roviaro v. United States*, 353 U.S. at 62; *Ohio v. Roberts*, 448 U.S. 56, must be balanced against the accused's confrontation right in cases such as this where the prosecution has shown that the child will be further traumatized by testifying in the defendant's physical presence.

The trial court, in making this finding, ought to be able to rely, as did the trial judge in *Craig*, on the testimony of experts it finds to be credible who are subject to cross-examination, a procedure found insufficient by the court below. *Cf. Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989); *Altmeyer v. State*, 496 N.E.2d 1328 (Ind.

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the case. The Massachusetts court stated the interests to be:

> (a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote sound and orderly administration of justice . . . ; and (e) to preserve evidence and obtain just convictions.

Id. at 607 n.18.

App. 1986) (upholding Ind. Code Ann. § 35-37-4-6(c)(2)(i) (West 1986) which allows certification by a psychiatrist that the child would be traumatized by so testifying, to show that the child is unavailable to testify); Cal. Evid. Code § 240 (West Supp. 1990) (expert testimony regarding the child's trauma is sufficient).[26]

The Maryland Court of Appeals decision in *Craig* is contrary to the previously stated compelling governmental interest of protecting child victims of sexual abuse in the prosecution of such cases. While it acknowledges the competing interests of the right to confrontation and the protection of the child witness, it reads *Coy* too narrowly in limiting the use of the exception contemplated in Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii). The Maryland Court of Appeals erroneously concludes that the defendant's constitutional right of confrontation outweighs the serious emotional harm a child victim could endure and the likelihood that the trauma of confronting the abuser in court will hinder the child's ability to communicate in the open courtroom.

In the case before this Court, there was expert testimony of the children's inability to testify when confronting the defendant in person. The child victims testified under oath, were seen by the jury, and were subject to complete cross-examination. This should be held to satisfy the Sixth Amendment's mandate.

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[26] By analogy, where the prosecution proves a witness to be unavailable due to physical or mental illness, it may offer particular types of out-of-court statements by the witness under exceptions to the hearsay rule. *See* Fed. R. Evid. 804.

CONCLUSION

By its overly strict interpretation of the confrontation requirement of the Sixth Amendment, the Court of Appeals of Maryland, relying on *Coy*, has effectively nullified Maryland's closed circuit television law meant to protect child victims, a statute that, by its own terms, requires a case-specific finding of necessity before the closed-circuit procedure may be used. The Maryland court, in erecting a two-step confrontation hurdle for children and prosecutors to surmount before the protective procedures in the statute may be invoked, has required that abused children be subjected to that very emotional trauma from which the law was intended to protect them.

The precedents of this Court indicate that protection of children and prosecution of child abuse are compelling State interests. When such interests are balanced against a defendant's Sixth Amendment confrontation right, the minimal infringement which occurred in the *Craig* trial is justified.

For these reasons, *amici* request this Court to reverse the decision of the Court of Appeals of Maryland which overturned the conviction of Sandra Ann Craig in the Circuit Court for Howard County, Maryland.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE STEPHANIE ROPER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

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IN THE

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OCTOBER TERM, 1989

No. 89-478

STATE OF MARYLAND,
Petitioner,
v.
SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE STEPHANIE ROPER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner, the State of Maryland. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

The Stephanie Roper Foundation is a volunteer, nonprofit corporation based in Maryland. The organization was named in memory of Stephanie Roper, a young Maryland woman who was kidnapped, raped repeatedly, tortured and murdered. Thereafter, her killers were given concurrent sentences which made them eligible for parole in 11 years. The Foundation, established by the parents of Stephanie Roper, was formed in response to problems within the criminal justice system in its treatment of victims of crime. The purpose of the Foundation is to conduct research and analysis of criminal justice issues as well as to increase public awareness of victims' rights

and problems of the criminal justice system. The Foundation seeks to educate the public and to advocate the fair treatment of crime victims so that in Maryland the criminal justice system will treat victims and their families with courtesy, respect, dignity, compassion and justice.

SUMMARY OF ARGUMENT

This case presents the question whether the Confrontation Clause requires four children, ages four to seven, who have suffered from repeated sexual abuse, to testify in the physical presence of their alleged assailant at her criminal trial. The Maryland Court of Appeals answered this question affirmatively, holding that child-abuse victims could virtually never testify in criminal proceedings except during a face-to-face encounter with the defendant. Our Constitution is not so brutal. As we show below, the Confrontation Clause permits video testimony where the trial court determines that a face-to-face encounter would likely cause emotional harm to a child-abuse victim or prevent the victim from effectively communicating.

The Sixth Amendment does not impose any absolute requirement of a face-to-face encounter between a criminal defendant and the witnesses against him. This Court has specifically held that the Confrontation Clause establishes only a "preference" for face-to-face encounters and that considerations of public policy may overcome this preference in appropriate cases. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Indeed, an absolute requirement of face-to-face encounters would be squarely contrary to many of this Court's decisions involving the hearsay rule, and would be a radical departure from the Court's understanding of other important Constitutional protections.

Governmental efforts to protect child-abuse victims from face-to-face encounters with their alleged assailants are supported by the most compelling of public policies. It requires no citation to prove that nothing we have is more precious than our children. And this Court

has repeatedly recognized the unique vulnerabilities of children and the special power of the state as *parens patriae* to safeguard the children of its citizens. *Prince v. Massachusetts*, 321 U.S. 158, 166 & 168-69 (1944); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Similarly, face-to-face encounters will often subvert the truth-finding process in child-abuse cases because the victims may lose their ability to communicate their experiences.

Testimony by television does not materially compromise the Confrontation Clause's guarantees. Technological advances permit video displays that fully reveal the witness's demeanor to both the defendant and the jury. At the same time, telephones allow defense counsel to confer freely and privately with the defendant while cross-examining the child witness. Other provisions of the Constitution—like the First and Fourth Amendments—have long been interpreted as applying to modern technologies. *Katz v. United States*, 389 U.S. 347 (1967). Similarly, the Confrontation Clause should be satisfied by new modes of "confrontation," that the Framers could not have foreseen, but that provide the functional equivalent of face-to-face encounters.

The trial judge in the present case found, based on the expert testimony of therapists who had treated the child-abuse victims, that a face-to-face encounter with the defendants would likely cause emotional harm. Relying on that determination, he permitted the victims to testify by one-way closed circuit television. The Maryland Court of Appeals reversed the trial court's decision. The Court of Appeals adopted a "least restrictive means" test, which required that the child-abuse victims be compelled to attempt to testify in the defendant's presence—and fail—before televised testimony would be permitted.

Nothing in the Confrontation Clause compels child-abuse victims to endure such ordeals. Perversely, the Court of Appeals' ruling would require the state—as a condition of permitting televised testimony—to inflict upon child-abuse victims the very emotional harm that

televised testimony seeks to prevent. Such an irrational and callous requirement is all the more inappropriate because televised testimony provides a functional equivalent to face-to-face encounter that does not materially compromise the defendant's Confrontation Clause rights. Rather, the appropriate Confrontation Clause standard is that a child-abuse victim may testify by television provided that the trial court determines that a face-to-face encounter with the defendant would likely cause emotional harm or prevent the victim from effectively communicating.

ARGUMENT

I. The Confrontation Clause Establishes Only a Preference for "Face-to-Face" Encounters Which May Be Overcome by Compelling Public Policies

The Sixth Amendment provides broadly that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Nothing in the language or the history of this Clause confers any absolute right to a face-to-face encounter between a criminal defendant and the witnesses against him. The Court said precisely this in *Ohio v. Roberts*, where it held that the Confrontation Clause creates only a "preference" for face-to-face confrontation at trial and that "competing interests" may overcome this preference.[1] Put differently, "[o]f course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[2]

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[1] 448 U.S. at 63-64; *see also Coy v. Iowa*, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring). Indeed, the Court in *Roberts* allowed admission of the prior testimony of an unavailable witness because of the public's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."

[2] *Chambers v. Mississippi*, 410 U.S. at 295; *see also Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934) (Cardozo, J.) ("Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. . . . *The exceptions are not even static, but may*

There are compelling reasons not to disturb this Court's settled understanding that the Confrontation Clause creates no absolute right to face-to-face encounters. First, such a view would prohibit—as a matter of federal constitutional law—virtually all exceptions to the hearsay rule. "If one were to read [the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial."[3] This Court has long and repeatedly held that the Confrontation Clause imposes no such requirement.

Nearly a hundred years ago, in *Mattox v. United States*, for example, the Court rejected a Confrontation Clause challenge to the reading of a deceased witness' prior testimony at a defendant's retrial.[4] It reached this result notwithstanding the fact that the defendant was obviously unable to confront the witness at the second trial, reasoning that:

> there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. . . . [G]*eneral rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to con-*

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be enlarged from time to time if there is no material departure from the reason of the general rule." (emphasis added).

[3] *Ohio v. Roberts*, 448 U.S. at 63. *See also* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 800[04], at 800-19 to -20 (1988) ("Taken literally this clause could mean that no evidence falling within a hearsay objection may be admitted against an accused unless the declarant is available to testify."); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185, 1200-01 n.65 (1979).

[4] 156 U.S. 237 (1895).

> *siderations of public policy and the necessities of the case. . . . The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.*[5]

More recently, this Court has approved the admissibility of testimony where no face-to-face encounter *ever* occurred, upholding the admission of hearsay statements of non-testifying coconspirators.[6]

If the Confrontation Clause imposed some absolute face-to-face encounter requirement, then all of these decisions would have been wrongly decided. Indeed, such requirement would see the Confrontation Clause wielded to overturn major aspects of our evidentiary system which has evolved—without significant doubt as to its constitutionality—for more than two centuries.[7]

Second, the historical record surrounding the Clause is at best fragmentary and, to the extent that some original intent may be discerned, it shows that no absolute requirement of face-to-face encounters was contemplated by the Framers. Thus, as Justice Harlan has explained, "[i]t is common ground that the historical understanding of the [Confrontation] Clause furnishes no solid guide to adjudication. . . . Such scant evidence as can be culled from the usual sources suggests that the Framers understood 'confrontation' to be something less than a right to exclude hearsay. . . ." [8]

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[5] 156 U.S. at 243-44; *see also Reynolds v. United States*, 98 U.S. 145 (1878).

[6] *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986).

[7] There are 24 exceptions to the hearsay rule, as set forth in the Federal Rules of Evidence, that apply regardless whether the declarant is available for cross-examination.

[8] *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result).

And early decisions—like *Mattox* and *Reynolds*—quite clearly rejected any rigidly literal view of the Confrontation Clause. Indeed, according to Dean Wigmore, "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*" [10] In light of this historical record, basic principles of judicial restraint and deference to popularly-elected state legislatures counsel firmly against any absolutist interpretation of the Confrontation Clause.

Third, the notion that a defendant's confrontation rights are not absolute, and may be overidden by competing public policies, should be neither surprising nor unusual. Rather, such an approach simply mirrors this Court's analysis of other important constitutional rights. For example, this Court has repeatedly held that the First

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[9] *California v. Green*, 399 U.S. 149, 174-75 (1970) (Harlan, J., concurring); *see also id.* at 176 ("[T]he Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process—all incidents of the adversarial proceeding before a jury as evolved during the 17th and 18th centuries."). As to the state of the historical record, Justice Harlan remarked that "my own research satisfies me that the prevailing view—that the usual primary sources and digests of the early debates contain no informative material on the confrontation right—is correct." *Id.* at 176 n.8. *See also* R. Rutland, *The Birth of the Bill of Rights* 202-17 (1955); Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 Conn. L. Rev. 529, 532 & n.15 (1974); Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 208-17 (1984) ("Omissions and ambiguities in the historical record have fueled the wide-ranging debate about the meaning of the confrontation clause."); Recent Development, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 Vand. L. Rev. 1511, 1515 & n.25 (1989).

[10] 5 J. Wigmore, *Evidence in Trials at Common Law* § 1397, at 158 (Chadbourn rev. 1974) (emphasis in original).

Amendment's literal command that Congress make no law abridging the freedom of speech "is not an unlimited, unqualified right, but . . . must, on occasion, be subordinated to other values and considerations." [11] This Court's Equal Protection jurisprudence is no different. In *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court held that commercial regulations would be upheld against Equal Protection challenges so long as they were reasonably related to some legitimate governmental interest.[12] And, this Court has held that race-based classifications may be sustained if necessary to promote a compelling state interest.[13] Finally, earlier this Term the Court held that the Fifth Amendment privilege of a child's custodian can be overridden by a court order to produce the child.[14] Just as all of these fundamental constitutional rights are not absolute, the Sixth Amend-

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[11] *Dennis v. United States*, 341 U.S. 494, 503 (1951); *see also Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). In *Konigsberg*, Justice Harlan, for the Court, wrote:

> [W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Id. at 49.

[12] 348 U.S. 483 (1955).

[13] *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[14] *Baltimore City Dept. of Social Services v. Bouknight*, Nos. 88-1182 & 88-6651, slip op. at 5 (U.S. Feb. 20, 1990). Even though the defendant's act of turning the child over was testimonial (and might aid a subsequent criminal prosecution), this Court reasoned that the State had a legitimate regulatory interest in the child's safety; thus, the trial court could properly issue an order, enforceable by its contempt power, requiring that the defendant turn the child over to state authorities. *Id.*, slip op. at 4-12. The Court did note, however, that limitations might exist upon the State's ability to use the testimonial aspects of defendant's act of production in subsequent criminal proceedings. *Id.*, slip op. at 11-12.

ment's "preference" for face-to-face encounters is similarly not absolute and must, in appropriate cases, give way to competing public policies.

Finally, it is also clear that the Confrontation Clause was designed principally to accomplish objectives *other than* requiring face-to-face encounters. As Dean Wigmore has explained, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination." [15] This Court has also long

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[15] 5 J. Wigmore, *supra*, § 1395, at 150; *see also id.* ("The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination . . . ."). Other commentators have concurred with Wigmore as to the primacy of cross-examination as an element of the right of confrontation. *See, e.g.*, E. Cleary, *McCormick on Evidence* § 252 (1984); 4 D. Louisell & C. Mueller, *Federal Evidence* § 418 (1980); 4 J. Weinstein & M. Berger, *supra*, at ¶ 800[04].

Wigmore also recognized that a "secondary and dispensable element" of the right of confrontation also existed at common law: the witness's presence before the factfinder "so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom." 5 J. Wigmore, *supra*, at § 1399 at 199. Wigmore expressly stated that this latter element did not require a face-to-face confrontation between the witness and the defendant—it would be satisfied "if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed." *Id.* (emphasis in original). As historical support for his position, Wigmore cited the trial for treason of the Earl of Stafford before the Lords at Westminster in 1680. *Id.* at 200 n.2. The relevant portion of that trial transcript reads as follows:

> Stafford: I beg your lordships that [the witness] may look me in the face, and give his evidence, as the law is.
>
> Sir John Trevor: My lords, if this noble lord, the prisoner at the bar, will have the witness to look him continually in the face, the court will not hear half his evidence: *we desire he may address himself, as the law is, to your lordships and the judges.*
>
> Stafford: I desire the letter of the law, which says, my accuser shall come face to face.
>
> [the Witness]: My lords, I am willing to do as your lordships shall order.

[Continued]

emphasized that other incidents of the Confrontation Clause—principally the right of cross-examination—are the paramount objectives of the Clause.[16] At least where these principal purposes of the Confrontation Clause are safeguarded, there is little cause for straining to ensure opportunities for a face-to-face confrontation. Particularly is this so since even the right to cross-examination—the central protection of the Clause—may be overcome by competing public policies.[17]

II. Compelling Public Policies Permit Shielding a Child Abuse Victim from Face-to-Face Encounters with the Defendant

Compelling public policy considerations clearly require shielding a child-abuse victim from face-to-face encounters

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[15] [Continued]

Lord High Stewart: *My lord, you do see the witness, that is enough for face to face . . .*

In re Stafford [1680] 7 How. St. Tr. 1293, 1341 (emphasis added). This procedure, whereby the accused could see the witness but apparently the witness could not see the accused, is functionally equivalent to the one-way closed-circuit broadcast employed in this case.

[16] In *Mattox v. United States*, 156 U.S. at 242, the Court recognized that the primary purpose of the Confrontation Clause was to prevent the admission at a criminal trial of *ex parte* affidavits, where the accused did not have the opportunity of "testing the recollection and sifting the conscience of the witness." And in *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), this Court wrote that "[o]ur cases construing the [Confrontation C]lause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *See also Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Barber v. Page*, 390 U.S. 719, 721 (1968); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 Colum. L. Rev. 1294, 1302 (1985).

[17] *Mattox v. United States*, 158 U.S. at 243; *United States v. Inadi*, 475 U.S. 387; *Dutton v. Evans*, 400 U.S. 74.

with the defendant. We show below that such encounters may cause serious emotional damage to child-abuse victims and can subvert the truth-determining process in child-abuse cases. Moreover, technological developments have enabled trial courts to provide substitutes for face-to-face encounters that minimize the effects on values protected by the Confrontation Clause.

A. *A Face-to-Face Encounter with the Defendant May Cause Serious Emotional Damage to Child Abuse Victims*

We have nothing more precious than our children. We know this from our daily experience, which requires no citation. And we know it from our cultural traditions, which provide more citations than space permits. From the Bible, [18] through Homer, [19] Cicero [20] and the Middle Ages,[21] to classic American literature,[22] history's greatest writers have testified to the inestimable value of our children.

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[18] *Old Testament: Psalms*, cxxvii, 5 ("Happy is the man that hath his quiver full of them.")

[19] Homer, "Apothe[illegible]s No. 13" (c. 850 B.C.), *in The Contest of Homer and Hesiod, reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("Children are a man's crown.").

[20] Cicero, "Post Reditum ad Quiriles," Ch. i, sec. 2 (37 B.C.), *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("Of all nature's gifts to the human race, what is sweeter to a man than his children?").

[21] Torriano, *Piazza Universale* 89 (1666), *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("He that has no children knows not what is love.").

[22] C. Dickinson, "The Children," *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("They are angels of God in disguise."); Longfellow, "Children," St. 9, *The Poetical Works of Longfellow* (1975) ("Ah! What would the world be to us if the children were no more?"); Whittier, "Child-Songs," *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("The child must teach the man.").

At the same time, children are among the most vulnerable members of our society. Thus, the law has long recognized the special responsibilities and powers of the state in protecting children. This is embodied in the ancient authority of the several states, as *parens patriae*, to protect children within their jurisdiction.[23] As one early decision put it,

> It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.[24]

Accordingly, the States have long retained the ultimate power over child custody,[25] and have routinely legislated

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[23] *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."); *Cactus Corp. v. State ex rel. Murphy*, 14 Ariz. App. 38, 480 P.2d 375 (1971); *In re Vasko*, 238 A.D. 128, 263 N.Y.S. 552 (1933).

In addition, the special place of children is reflected in various aspects of American tort law, *e.g.*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 1071-72 (5th ed. 1984) ("practical effect" of immunity from tort liability for infants); Restatement (Second) of Torts 283A (1965); *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975); and contract law. *E.g.*, 1A A. Corbin, *Corbin on Contracts* § 227, at 335-39 (1963); 2 S. Williston, *A Treatise on the Law of Contracts* §§ 222-248, at 7-76 (3d ed. 1959); Restatement (Second) of Contracts § 14, at 37-41 (1981).

[24] *Oakes v. Oakes*, 45 Ill. App. 2d 387, 195 N.E.2d 840, 844 (1964); *see also Van Walters v. Board of Children's Guardians*, 132 Ind. 567, 32 N.E. 568 (1892); *Stubbs v. Hammond*, 257 Iowa 1071, 135 N.W.2d 540 (1965).

[25] *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815 (1930); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947) (*writ ref.*); *Turner v. Children's Home Soc'y*, 158 Va. 406, 163 S.E. 399 (1932).

in countless ways to ensure the health and safety of children.[26]

The unique importance and vulnerability of children is likewise reflected in this Court's constitutional decisions. Thus, in *Prince v. Massachusetts*, this Court rejected a First Amendment challenge to a statute forbidding children from selling newspapers in public places. The Court reasoned that:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. *A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens* . . . . Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power . . . .[27]

Elsewhere, this Court has expressly recognized that there is a compelling state interest in "safeguarding the physical and psychological well-being of a minor."[28] And this Court has repeatedly "sustained legislation aimed at protecting the physical and emotional well-being of youth

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[26] *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587 (1929); *People v. Walton*, 70 Cal. App. 2d Supp. 862, 161 P.2d 498 (1945); *Dezarn v. Commonwealth*, 195 Ky. 686, 243 S.W. 921 (1922); *Thistlewood v. Trial Magistrate*, 236 Md. 548, 204 A.2d 688 (1964).

[27] 321 U.S. 158, 168-69 (1944) (emphasis added); *see also id.* at 166 ("But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.").

[28] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

even when the laws have operated in the sensitive area of constitutionally protected rights." [29]

The present case squarely implicates a compelling public interest in protecting our children from sexual abuse and emotional harm. The sexual abuse of children is a profoundly disturbing national tragedy. One well-respected researcher has found that one of every 5 women, and one out of every 11 men had been sexually victimized as children.[30] More recent studies indicate that actual incidence of abuse may be even higher.[31] According to some studies, nearly 2,000,000 children are sexually molested each year.[32]

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[29] *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). In *Bethel School District No. 403 v. Fraser*, the Court observed that its "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." 478 U.S. 675, 684 (1986); *see also Ginsberg v. New York*, 390 U.S. at 640 ("The State . . . has an independent interest in the well-being of its youth"; "society[has a] transcendent interest in protecting the welfare of children" (quoting *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 334 (1965)).

[30] D. Finkelhor, *Sexually Victimized Children* 57 (1979).

[31] *See, e.g.*, American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985* 16 (1987) (hereinafter "*Highlights*") (from 1976 through 1985 the reported incidence of sexual abuse per 10,000 children increased from less than 1% to 17.9%); American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* 7 (1985) (study indicating that as many as one in every three female adults was sexually abused as a child).

[32] *See, e.g., Highlights, supra*, at 3 (reports of child abuse increased from an annual rate of 669,000 in 1976 to over 1.9 million in 1985); *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2 (an American Humane Society study showed an increase of 200% in the reporting of sexual abuse from 1976 to 1980); *A Hidden Epidemic*, Newsweek, May 14, 1984, at 33 ("[S]omewhere between 100,000 to 500,000 American children will be molested this year."); *Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary,*

The evidence is likewise overwhelming that the victims of child sexual abuse are likely to suffer further harm if they are forced physically to confront their abusers at trial. According to one authority:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination; *facing the accused again*; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative.[33]

Other authorities have also warned of the danger—acted on by a majority of the several states—that a face-to-face encounter with the defendant can seriously harm a child abuse victim.[34]

98th Cong., 2d Sess. 77 (1984) ("The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes."); *Abused Children in America: Victims of Official Neglect, Report of the Select Comm. on Children, Youth and Families*, H.R. Rep. No. 260, 100th Cong., 1st Sess. (1987).

[33] Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1969) (emphasis added).

[34] Parker, *The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?*, 17 New Eng. L. Rev. 643, 644 & 646 (1982) ("While the assault itself is emotionally damaging [to the child victim], the ordeal of bringing criminal charges can compound the danger"; "psychological studies conducted during the last thirteen years have indicated that the problem is even more serious than was suggested by Libai"); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 732 (1985); *see also* D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* 17-18 (1985); Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3-4 (1983); Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. Fam. L. 149, 182-84 (1985-86); Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, Children's Legal Rights J., Fall 1984, at 2.

This Court has previously declined to give unlimited compass to Confrontation Clause rights where a state sought to protect the welfare of abused children, even where that means did not promote truth-seeking goals. In *Pennsylvania v. Ritchie*, this court denied defense counsel direct access to the file maintained by the state agency relating to the abused child, the 13-year-old daughter of defendant, holding that *in camera* review for exculpatory information by the trial court was sufficient. Even though this rule would deprive defendant of "the benefits of an 'advocate's eye,'" this Court reasoned that "[t]o allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information." [36] In sum, there plainly exists a compelling public interest in dealing with the disturbing and escalating problem of child abuse, and in safeguarding the most vulnerable and innocent members of our society from the ordeal of public, physical confrontation with their alleged assailant.[37]

B. *Face-to-Face Encounters May Subvert the Truth-Determining Process in Child Abuse Cases*

There is a second compelling public interest in shielding child-abuse victims from face-to-face encounters with

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[35] 480 U.S. 39 (1987).

[36] *Id.* at 60. The Court continued:

> If the [state agency] records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. . . . [Because of the difficulty in prosecuting cases of child abuse i]t therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected.

Id.

[37] *See New York v. Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

their alleged attackers. Absolute insistence upon face-to-face encounters in the present case—and in child abuse cases generally—will not only fail to serve the truth-determining process, but will in fact subvert this process. We may assume that, as to *adult* witnesses generally, testifying before the accused in open court usually serves to enhance the reliability of the evidence presented. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" [38]

As to *child* witnesses, however, a face-to-face encounter is not likely to have the same effect. The pressure and tension imposed upon an adult witness by traditional courtroom procedures will usually positively impress him or her with an appreciation of the solemnity of the occasion, and the consequent importance of telling the truth. As a clear majority of state legislatures has concluded, the more vulnerable child witness is likely to become so disturbed by the very same procedures that he or she will be rendered noncommunicative.[39]

For example, in *State v. Sheppard*, the court accepted the opinion of a forensic psychiatrist that the video testimony of the child victim, rather than testimony by means of traditional courtroom procedures, would actually *improve* its accuracy.[40] The doctor stated the basis of his opinion for the record:

> An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She be-

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[38] *Coy v. Iowa*, 108 S. Ct. 2798, 2801 (1988) (quoting *Pointer v. Texas*, 380 U.S. at 404); *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980).

[39] Brief of *Amicus Curiae* The American Bar Association at 6 & 1a-18a, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757).

[40] 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984).

> comes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.[41]

Other authorities have stated the same conclusions.[42]

Thus, the very features that the Confrontation Clause envisions as enhancing the truthfulness of testimony would, in the context of child sexual abuse cases, have exactly the opposite effect.[43] Requiring the child victim to testify in front of his or her abuser may cause an absolute inability on the part of the victim to relate the abusive events. Or testimony in the physical presence of the defendant may be so compromised by emotional distress as to render it unintelligible, unpersuasive or even inaccurate.

It requires no lengthy discussion to demonstrate that the states have entirely legitimate and compelling inter-

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[41] *Id.*

[42] Avery, *supra*, at 3-4; Comment, *The Young Victim*, *supra*, at 742 n.124 ("Face-to-face confrontation with extremely vulnerable victims, such as children, may diminish the reliability of their testimony rather than enhance it."); *see also* D. Whitcomb, E. Shapiro & L. Stellwagen, *supra*, at 51 ("Closed circuit testimony is often advocated . . . because the child simply freezes on the stand."); Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. Mich. J. of L. Reform 131, 137-38 (1981).

[43] *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986) ("Ironically, putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony." (citing Note, *Parent-Child Incest*, *supra*, at 132).

ests in preventing such untoward developments. This Court has repeatedly held that the "mission" of the Confrontation Clause is to advance "the accuracy of the truth-determining process in criminal trials." [44] And the "truth-determining process" will be significantly advanced in a broad range of child-abuse cases by shielding child-abuse victims from face-to-face encounters with their alleged molester.

C. *Closed Circuit Testimony Does Not Materially Compromise a Defendant's Confrontation Clause Rights*

Modern technological devices permit trial courts to shield child-abuse victims from face-to-face encounters, without materially compromising the defendant's Confrontation Clause rights. In particular, closed circuit testimony by child-abuse victims preserves virtually all of a defendant's right under the Confrontation Clause.[45] The defendant and the tribunal may clearly see and hear the witness, enabling them to fully observe his or her demeanor and assess his or her credibility. The defendant's

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[44] *Dutton v. Evans*, 400 U.S. at 89 (plurality opinion); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987); *United States v. Inadi*, 475 U.S. at 396; *Tennessee v. Street*, 471 U.S. 409, 415 (1985).

[45] Prior to permitting a child victim to testify at all, the court must make a preliminary finding that the victim is competent. Courts have typically looked to four factors in assessing a child's competency to testify: (1) the child's present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth; (2) the child's mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence; (3) the child's possession of memory sufficient to retain an independent recollection of the observations; and (4) the child's capacity to communicate and articulate the memory of such observation and his or her capacity to understand simple questions about the occurrence. Melton, Bulkley & Wulkan, "Competency of Children as Witnesses" in *Child Sexual Abuse and the Law* 125, 127 (J. Bulkley ed. 1981); *see also* J. Meyers, *Child Witness Law and Practice* § 3.2, at 54-59 (1987); D. Whitcomb, E. Shapiro & L. Stellwagen, *supra*, at 33.

counsel can fully cross-examine the witness. The defendant can freely consult with counsel by telephone during the witness's direct testimony and during cross-examination. And when a trial court permits a child-abuse victim to testify by video, it may take special steps to enhance the truth-determining process—such as by questioning the child concerning his or her testimony and cautioning the child as to the requirement to be truthful.

The Court has frequently recognized that the protections of the Bill of Rights must be interpreted in light of changing technological conditions. The Fourth Amendment applies, in certain circumstances, to electronic eavesdropping,[46] to surveillance by beeper,[47] to aerial reconnaissance,[48] and to other technologically sophisticated means of law enforcement. Nor would it be suggested that the First Amendment does not protect televised or other broadcast speech. By the same analysis, the Confrontation Clause ought not be interpreted to exclude confrontation via technological media that the Framers would not have foreseen.[49] As one jurist has put it:

> "There is nothing in the Constitution that says that the right to the confrontation of the accused must be two feet, three feet or within the same room . . . . [R]emoving those constraints that technology has removed, [permits an interpretation of the Confrontation Clause requiring] not necessarily physical confrontation in a courtroom, but confrontation through electronic means." [50]

Indeed, in some respects, televised or videotaped testimony may actually improve the jury's opportunity to observe the witness's demeanor.[51] As one commentator has remarked:

> Modern television techniques are capable of presenting clear and undistorted images, and in some instances, are an improvement over the view that the jury has of the witness. For example, with the use of a zoom lens and large television screens, the witness's facial details can be observed with great clarity.[52]

All these considerations led one state court to conclude, "this trial technique serves as the functional equivalent of in-court testimony." [53] The clear weight of state court authority is in accordance with this view.[54]

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[46] *Katz v. United States*, 389 U.S. 347 (1967).

[47] *United States v. Karo*, 468 U.S. 705 (1984).

[48] *Cf. Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

[49] At the time of this Court's early Confrontation Clause decisions, courts could not have conceived of an alternative to the witness's physical presence in the courtroom which would substantially fulfill the essential goals of the Confrontation Clause. *See* Comment, *The Young Victim*, *supra*, at 740. The same argument has equal applicability to the right of confrontation at common law. Rather than an absolute requirement of face-to-face confrontations, the better view of this Court's early cases and the common law requirement is that such confrontations were the only means conceivable, given the limits of available technology, which would adequately protect the rights of the accused. *See id.*

[50] *Child Victim Witness Protection Act of 1985: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 95 (1985) (statement of H. Mark Kennedy, Circuit Court Judge, Montgomery County, Alabama).

[51] *See* Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. Puget Sound L. Rev. 109, 118 (1988).

[52] *Id.* at 118.

[53] *State v. Daniels*, 484 So. 2d 941, 945 (La. Ct. App. 1986).

[54] *See, e.g., Kansas City v. McCoy*, 525 S.W.2d 336, 339 (Mo. 1975) (televised testimony did not significantly affect the ability to question and observe the witness; jury impact found to be little different whether witness appeared in court in person or by television); *State v. Sheppard*, 484 A.2d at 1341 ("Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function."); *People v. Algarin*, 129 Misc. 2d 1016, 498 N.Y.S.2d 977, 981 (1986) ("It is apparent to this court from a demonstration of the equipment used in this case that closed-circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public. . . . [I]nstantaneous closed-circuit television can surely satisfy the dictates of the Confrontation Clause."); *see also Common-*

III. The Trial Court's Findings in the Present Case Satisfy the Confrontation Clause

In the present case, the Maryland Court of Appeals apparently conceded that the state had a compelling interest in safeguarding the integrity of the truth-determining process. But the lower court concluded that this interest could overcome Confrontation Clause values only in the rare cases where trial courts had forced a child-abuse witness to attempt to testify in the defendant's presence, and the child had broken down. We show below that there is simply no basis in precedent, public policy or common sense for the procedures that the Maryland Court of Appeals would impose on trial courts. Rather, we show that it is constitutionally permissible to implement protective measures for child abuse victims whenever a trial court has made case-specific findings—based on personal observation or expert testimony—that the child victim or witness would be likely to suffer emotional harm if forced to testify in the presence of defendant.

A. *The Trial Court's Findings*

In this case, the trial court ruled that the testimony of four victims of sexual abuse, children ages 4 to 7, should be taken by one-way closed circuit television.[55]

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wealth v. Willis, 716 S.W.2d at 228; *State v. Twist*, 528 A.2d 1250, 1258 (Me. 1987); J. Myers, *supra*, § 6.4, at 395. *But see Commonwealth v. Bergstrom*, 402 Mass. 534, 524 N.E.2d 366, 375-76 (1988) (Because of poor color, sound, and overall quality of transmission, it was an error to allow televising of child's testimony to jury.); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575, 582 (1986) (Testimony was inadmissible where camera frequently failed to provide the jury with a full view of the child and the examiner.).

[55] The statute authorizing this procedure is Section 9-102 of the Courts and Judicial Procedure Article of the Annotated Code of Maryland. Section 9-102, entitled "Testimony of victim in child abuse case by means of closed circuit television," provides in pertinent part:

> (a) (1) In a case of abuse of a child . . ., a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989).

Prior to making this ruling, the trial court heard testimony as to the likely effect that testimony in defendant's presence would have upon each child from therapists who had treated them and who had considerable experience working with abused children.[56]

As to one child, with whom she had spent between 20 and 30 hours, the therapist testified that:

> "it would be very difficult if not impossible for [the child] to sit in the same room with [defendant] and discuss the alleged abuse incidents. . . . [She] would probably stop talking and she would withdraw and curl up." [57]

As to a second child, whom she had seen in 18 therapy sessions, the therapist testified that the child saw the defendant as a " 'threatening figure,' " and added that the child had

> "had difficulty talking—making his disclosure to other people including police and protective services. He tends to change the subject which is his manner of avoiding the issue. He becomes agitated and depressed. He bursts into tears and would be unwilling or unable at that point to proceed." [58]

As to a third child, whom she had seen in 36 therapy sessions, the therapist stated:

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[56] *Craig v. State*, 76 Md. App. 250, 544 A.2d 784, 801-02 (1988), *rev'd*, 316 Md. 551, 560 A.2d 1120 (1989) (en banc), *cert. granted*, 1990 U.S. LEXIS 343.

[57] *Id.* at 801.

[58] *Id.*

> "As to [defendant], she perceives herself, again, as her life has been threatened, that of her parents and her sibling too. She believes that that [*sic*]—[defendant] is capable and willing to carry out those threats at home and [the child] is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations." [59]

As to the last child, who was treated by another therapist, a psychologist, that therapist remarked:

> "he has experienced [an] extreme level of high anxiety and distress by talking about this very traumatic event and that his ability to communicate would be grossly impaired if he were to testify in an open court in the presence of [defendant].[60]

After hearing this testimony, the trial court found as a fact that:

> "the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and [it is] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102. . . ." [61]

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[59] *Id.* at 801-02.

[60] *Id.* at 802.

[61] *Id.* (ellipsis in original) As to that portion of these findings that refers to the effect of the children's testifying in the courtroom, the Maryland Court of Special Appeals, found that, in context,

> it is apparent that the court's concern was not so much forcing the children to testify in open court as requiring them to testify in the direct presence of [defendant]. We think it evident that the finding by the court, though couched in the statutory language, addressed that concern.

Id., n.14.

The Maryland Court of Appeals held that the trial court's actions failed to satisfy the Confrontation Clause.[62] Although opining that exceptions to the face-to-face requirement did theoretically exist, the court held that the trial court's case-specific findings were not specific enough.[63] The court further held that, under *Coy v. Iowa*, the trial court could not rely solely on the testimony of experts, but had to personally conduct " 'a particularized examination of all the circumstances concerning the impact of public testimony . . . upon the emotional health of the child.' " [64] And the court specifically held that this examination had to be conducted "in the presence of the defendant." Thus, even though the trial judge had personally examined the children in determining their competency,[65] that procedure purportedly failed to meet constitutional standards.[66]

B. *The Confrontation Clause Requires Only a Trial Court Determination that Face-To-Face Encounter with the Defendant Will Likely Cause Emotional Harm to the Child-Abuse Victim or Prevent the Victim From Effectively Communicating*

The decision of the Maryland Court of Appeals is wrong for a number of reasons. First, and most important, the lower court's requirement that a child-abuse victim be forced to attempt to testify in the defendant's presence requires the state itself to inflict on the child the precise emotional harm that Maryland's legislature has sought to prevent in authorizing televised testimony. There is nothing in the Confrontation Clause, its his-

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[62] *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

[63] *Id.* at 1127-29.

[64] *Id.* at 1129 (quoting *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275, 289 (1987) (quoting *People v. Algarin*, 498 N.Y.S.2d at 983)).

[65] *See id.* at 1128 n.11.

[66] *Id.* at 1128-29.

tory, or common sense that requires so callous and destructive a requirement.[67]

The Court of Appeals' requirement would inevitably inflict emotional harm on a significant number of children, who have already been damaged. This additional suffering is not needed. Expert testimony or personal observation permit a court to conclude, with reasonable reliability, that a child-abuse victim would likely suffer emotional harm from a face-to-face encounter.[68] And even if the trial court is wrong in its judgment, televised testimony does not materially compromise Confrontation Clause values, and may actually enhance them.

Second, the lower court apparently adopted a rigorous "least restrictive alternative" approach [69] that is without precedent in the context of the Confrontation Clause. Indeed, this Court in *Ohio v. Roberts* eschewed any "least restrictive alternative" analysis.[70] Given that televised confrontation provides a functional equivalent of face-to-face confrontation, the least restrictive alternative analysis of the lower court is inappropriate and would unduly frustrate compelling public interests.

Third, the lower court apparently applied the two-prong test requiring unavailability and indicia of reliability set forth in *Ohio v. Roberts*.[71] Under the *Roberts* test, as applied by the lower court, use of televised testimony would be allowable only if forcing the witness

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[67] *Cf. Pennsylvania v. Ritchie*, 480 U.S. 30 (1987).

[68] Courts routinely make comparable judgments in such matters as determining competency, assessing state of mind, and similar contexts.

[69] *See, e.g., Craig v. State*, 560 A.2d at 1128.

[70] 448 U.S. 56, 62-66 (1980).

[71] 448 U.S. 56. In *Ohio v. Roberts*, this Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Id.* at 66.

to testify in the defendant's presence would render the witness "unavailable." [72] The lower court's "unavailability" requirement has no place in Confrontation Clause analysis.

This Court has squarely held that the *Ohio v. Roberts* test is not constitutionally mandated whenever a defendant's right to confrontation has arguably been abridged. In *United States v. Inadi*,[73] for example, this Court expressly rejected the argument that a finding of unavailability is necessary before the hearsay statement of a non-testifying coconspirator is admitted.[74] Moreover, televised testimony under the circumstances of this case is simply not analogous to the sort of hearsay statements at issue in *Roberts*. As set out above, substantially all of the functions served by confrontation are fulfilled by the use of televised or videotaped testimony.[75]

Properly understood, the Confrontation Clause imposes none of the detailed substantive and procedural requirements set out by the Maryland Court of Appeals. Rather, the appropriate balance between Confrontation Clause values and competing public policies is struck by a straight-

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[72] *Craig v. State*, 560 A.2d at 1126 ("The question of whether a child is unavailable in the *Roberts* sense should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused."). *See also, Wildermuth v. State*, 530 A.2d 275.

[73] 475 U.S. 387.

[74] The Court in *Inadi* observed that:

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. at 394.

[75] *See* Comment, *Balancing the Right to Confrontation*, *supra*, at 117.

forward requirement that the trial court find that face-to-face confrontation with the defendant will likely cause emotional harm to the child-abuse victim or prevent the child from effectively communicating. This formulation properly reflects the fact that televised testimony is the functional equivalent of face-to-face confrontation. And it will also ensure an appropriate measure of discretion for trial courts, which will inevitably be presented with a myriad of factual circumstances: these will range from extremely young and vulnerable victims of brutal sexual assaults to more mature and less vulnerable victims. Just as trial courts have long enjoyed substantial responsibility in applying the hearsay rule,[76] so it is appropriate to confide to them a broad authority to resolve the questions presented in varying types of child-abuse cases.[77]

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[76] 4 J. Weinstein & M. Berger, *supra*, ¶ 800[03], at 800-16 ("Since the trial judge must balance the need and the value of the [hearsay] evidence against the dangers it would pose, he may consider factors affecting either side of the equation.").

[77] This analysis is consistent with the majority opinion in *Coy v. Iowa*, which suggested that exceptions to its general requirement of face-to-face confrontation might exist where a challenged statute required "individualized findings that . . . [the particular child victim before the court] needed special protection." 108 S. Ct. at 2803. Justice O'Connor's concurring opinion in *Coy* elaborated upon this point, and would "permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy." *Id.* at 2804-05.

CONCLUSION

For the reasons stated above, the decision of the Maryland Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ **BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Psychological Association (APA), hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for respondent has consented; the attorney for petitioner has not responded to APA's request for consent.

The American Psychological Association ("APA") is a voluntary, nonprofit, scientific, and professional organization with more than 75,000 members. It has been the major association of psychologists in the United States since 1892, and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. Among APA's major functions are promoting psychological research, improving research methods,

and promulgating information regarding human psychological behavior.

A significant proportion of APA membership provides direct clinical services to children and their families. Many other members have made important contributions to the developing scientific and clinical literature on the incidence, prevalence, epidemiology, psychological effects, and treatment of victims of childhood sexual abuse. Members of APA have also studied and published research on the abilities of children as witnesses, the emotional states of children who testify, and the credibility of children's testimony to jurors, as well as numerous aspects of procedural justice. Other members have been engaged in the diagnosis and treatment of sex offenders.

The APA has participated as *amicus* in many cases in this Court involving mental health and social science issues. APA contributes *amicus* briefs only where it has special knowledge to share with the Court. For example, APA submitted a brief in *Kentucky v. Stincer*, 482 U.S. 730 (1987), and this Court expressly relied upon the central submission in that brief:

> "Where a competency hearing bears a substantial relationship to the defendant's opportunity to defend, a court must then balance the defendant's role in assisting his defense against the risk of identifiable and substantial injury to the specific child witness. See Brief for American Psychological Association as Amicus Curiae 15-26 (noting that intuitive view that child victims of sexual abuse are particularly vulnerable in legal proceedings may not be correct for all children)."

482 U.S. at 747, n.20.

As in *Stincer*, APA regards this as a case in which it can make a significant contribution to the Court's consideration of the issues before it. APA wishes to inform the Court of the state of current social science data (studies and clinical experience) regarding the emotional distress experienced by sexually abused children in the legal system generally; the distress suffered specifically by children required to give testimony in face-to-face confrontation with a defendant; and the impact of such distress on child witnesses' ability to testify truthfully and accurately.

APA has significantly more to contribute now than it did in *Stincer*, because the data generated by psychological research has developed substantially since APA submitted its *Stincer* brief in January 1987. These data should assist the Court in weighing the degree to which this case implicates the state interests in 1) protecting child witnesses from severe emotional distress and 2) obtaining the most complete and truthful possible testimony from child witnesses in sexual abuse cases. The data therefore bear on the question whether and under what circumstances the Court should recognize an exception in this context to the defendant's constitutional right to meet face-to-face with those who give evidence at trial.

APA believes no other *amicus*, and certainly neither party, is in a position to provide the Court with this important information.

For the foregoing reasons, APA respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-478

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE

The interest of APA is described in the accompanying Motion for Leave to File Brief *Amicus Curiae*.[1]

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[1] Members of APA with expertise in the relevant area of scientific inquiry invariably play a leading role in drafting APA's *amicus* briefs. In this case, counsel gratefully acknowledges the substantial assistance of Murray Levine, Ph.D., J.D., Gail S. Goodman, Ph.D., and Gary B. Melton, Ph.D., and the assistance of Michael Saks, Ph.D., and nonmember Josephine Bulkley, J.D., in the preparation of this brief. A number of other scholars in APA, the American Psychology—Law Society, and the Consortium on Children, Families and the Law, reviewed and commented on the brief. Counsel also thanks Cathleen Anne Carter, Corrine M. Lindquist, Joseph R. Mills, Elizabeth L. Quarles, David Allan Steinweg, and Teri Ann Vigars for research assistance.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988), this Court did not decide whether a criminal defendant's Sixth Amendment right to a literal face-to-face confrontation with prosecution witnesses admits of exceptions to protect compelling state interests. The Court also did not decide whether, if so, protecting child victim-witnesses from emotional distress constitutes such an interest. This case presents these questions. APA submits that the right of face-to-face confrontation should give way in a case where a child victim-witness would likely suffer serious emotional distress from such a confrontation.

Reports of child abuse in this country have increased in recent years.[2] With this increase have come concerns that the legal system is often insensitive to child witnesses.[3] Psychologists have turned their attention to the study of the capabilities of children to testify, jurors' reactions to child witnesses, and the emotional effects of involvement in the legal process on child witnesses.

The resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with

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[2] When the National Center on Child Abuse and Neglect began collecting data in 1976, child protection agencies nationwide reported 1,975 cases of child sexual abuse. By 1982, this figure had grown to 56,607. Reports have continued to increase: in 1985, the figure reached 127,000, and in 1986 (the latest year for which statistics are available), it reached 132,000. AM. ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1986 (1988); AM. ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 (1987).

[3] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality opinion); CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley, Ed., 1983); D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS (1985) (hereinafter cited as "WHITCOMB, *supra* n.3").

their alleged abusers.[4] While this may argue for permitting the use of protective measures in many cases, there is also evidence that a substantial number of children are capable of testifying fully and accurately under conventional criminal procedures without serious and lasting harm. Moreover, although there is some basis for determining which children are most in need of such protection, knowledge remains sparse about which procedures are most likely to ameliorate harm. Therefore, intrusions on defendants' rights under the Confrontation Clause should be applied only on a case-specific basis, where necessary to protect individual child victim-witnesses. Point I.

Psychological research, clinical observation, and theory undercuts the rule of the Maryland Court of Appeals that a court must in every case require child victim-witnesses to take the stand and observe their degree of distress before forming a judgment whether protective measures are needed. Evidence other than observing the child actually suffer the injury, including expert testimony based upon psychological theory and research, can in many cases provide a sufficient basis for the determination without forcing the child to undergo the very harm the State wishes to avert before protection may be invoked. Point II.

Research also demonstrates that testifying in confrontation with the alleged abuser may in many cases cause child victim-witnesses to refuse to testify or to testify less completely than they are capable. Research further shows that jurors tend unduly to consider the comprehensiveness of children's testimony in evaluating their truthfulness. Requiring child witnesses to undergo face-to-face confrontation, therefore, may in some cases

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[4] In this regard, the evidence is much stronger than it was in January 1987, when APA submitted its *amicus* brief in *Kentucky v. Stincer*, 482 U.S. 730 (1987).

actually disserve the truth-seeking rationale that underlies the Confrontation Clause. Point III.

For these reasons, APA urges the Court to retain the case-by-case approach to Confrontation Clause exceptions suggested by the Court's opinion in *Kentucky v. Stincer*, 482 U.S. 730, 746, n.20 (1987). In those cases in which a compelling justification may exist to limit the scope of confrontation, APA submits that the procedures prescribed by the Court of Appeals frustrate the very purpose of protection. Courts should be flexible in accepting evidence from multiple sources of information, including experts, rather than insisting upon procedures likely to exacerbate the distress of already vulnerable child victim-witnesses.

I. SEXUALLY ABUSED CHILDREN FREQUENTLY SUFFER SERIOUS EMOTIONAL TRAUMA AND MAY BE PARTICULARLY VULNERABLE TO FURTHER DISTRESS THROUGH THE LEGAL PROCESS.

In *Coy v. Iowa*, 108 S. Ct. 2798 (1988), this Court held that the right of a defendant to confront prosecution witnesses face-to-face is a central aspect of the Confrontation Clause. *Id.* at 2803. The Court left to another day the question whether that right must give way, in appropriate circumstances, to a sufficiently compelling state interest, and specifically reserved the question whether protection of a child victim-witness in a sexual abuse case might give rise to such an exception. *Id.* Four members of this Court, however, reached these questions and answered them in the affirmative. *Id.* at 2805 (O'Connor, J., concurring) ("I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . The protection of child witnesses is . . . just such a policy."); *id.* at 2809 (Blackmun, J., dissenting) ("[A] State properly may consider the protection of child witnesses to be an important public policy [that] outweighs the narrow Confrontation Clause right at issue . . . .").

It is important to recognize that the area of compelling state concern is broader than the State's interest in obtaining complete and truthful testimony. As discussed in Point III, *infra*, it is true that protective measures may be necessary in many cases to ensure that a child victim will be able to tell "the whole truth and nothing but the truth." But in addition to this truth-seeking interest the State has a straightforward and compelling interest in protecting children from severe emotional distress imposed by the legal system without regard to the impact of such distress on the child's ability to tell the truth. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (State has a "compelling" interest in "safeguarding the physical and psychological well-being of . . . minor[s]"); *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring); *id.* at 2809 (Blackmun, J., dissenting). The psychological data suggests that both the State's interest in discovering the truth about sexual abuse and its interest in shielding minors from emotional distress imposed or exacerbated by the legal system may be threatened by strict adherence in a given case to a criminal defendant's right to "face" his or her accuser.

A. Child Victims Suffer Emotional Distress as a Result of their Victimization.

A recent review of studies of child victims of sexual abuse showed that a significant proportion of victims suffer moderate to severe emotional distress after the episode is disclosed.[5] The symptoms may include sleep

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[5] Browne & Finkelhor, Impact of Child Sexual Abuse: A Review of the Research, 99 PSYCHOLOGICAL BULL. 66 (1986); Conte & Berliner, The Impact of Sexual Abuse on Children: Empirical Findings, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISSUES (L. Walker ed. 1988).

and eating disturbances, fears and phobias, depression, guilt, shame and anger, school problems and running away. As many as a quarter of sexually abused children may also show inappropriate sexual behavior. The symptoms vary depending on the age and sex of the child.[6] Many victims are believed to suffer from Post-Traumatic Stress Disorder.[7]

For a subgroup of child victims, the effects of sexual abuse are particularly significant and persistent. Although a substantial proportion of those who recall having been sexually abused in childhood adapt well as adults, adults who report such experiences are more likely than others to have significant mental health problems: [8]

> "Empirical studies with adults confirm many of the long-term effects of sexual abuse mentioned in the clinical literature. Adult women victimized as children are more likely to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. Difficulty in trusting others and sexual maladjustment in such areas as sexual dysphoria, sexual dysfunction, impaired self-esteem, and avoidance of or an abstention from sexual activities have also been reported by empirical researchers, although agreement between studies is less consistent for the variables on sexual functioning." [9]

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[6] Browne & Finkelhor, *supra* n.5, at 99; J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN (1988); C. WALKER, B. BONNER, & K. KAUFMAN, THE PHYSICALLY AND SEXUALLY ABUSED CHILD: EVALUATION AND TREATMENT 112-114 (1988).

[7] Wolfe, Gentile & Wolfe, The Impact of Sexual Abuse on Children: A PTSD Formulation, 20 BEHAVIOR THERAPY 215 (1989).

[8] Briere & Runtz, Post Sexual Abuse Trauma, in LASTING EFFECTS OF CHILD SEXUAL ABUSE 85, 89 (G. Wyatt & G. Powell eds. 1988).

[9] Browne & Finkelhor, *supra* n.5, at 72.

Empirical research indicates that the typical adult who was abused in childhood has more difficulties in these areas, on average, than other adults.

B. Child Victims May Be More Likely Than Adult Victims to Suffer Substantial Distress as a Result of Testifying in the Physical Presence of the Defendant.

Testifying in court may be anxiety provoking for any witness. Certainly adult victims of sexual attack are known to have suffered stress and humiliation when forced to recount details of embarrassing events in court, submit to hostile cross-examination, and face the alleged offender.[10] As court dates approach, fear of testifying is one of adult rape victims' strongest fears.[11]

Yet children may be in an even more vulnerable position than adults. The period during which child sexual assault victims are involved in legal proceedings represents a time of special stress for them.[12] Stressors in childhood can slow the course of normal cognitive and emotional development such that stressed children do not advance at the same pace as their unstressed peers.

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[10] *See generally* S. Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).

[11] Calhoun, Atkeson, & Resnick, A Longitudinal Examination of Fear Reactions in Victims of Rape, 29 J. COUNSELING PSYCHOLOGY 655, 659 (1982).

[12] Goodman, Jones, Pyle, Prado, Port, England, Mason, & Rudy, The Child in Court: A Preliminary Report on the Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, in THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN? (G. Davies & J. Drinkwater eds. 1988); G. Goodman, The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court, Final Report to the National Institute of Justice, U.S. Dept. of Justice (1989) (reporting complete findings of same study) (hereinafter cited as "Goodman, *supra* n.12") (available upon request from counsel); Runyan, Everson, Edelsohn, Hunter, & Coulter, Impact of Legal Intervention on Sexually Abused Children, 113 J. PEDIATRICS 647 (1988).

Temporary developmental regressions may even appear. Although adults too may suffer distress from legal involvement, their development is more complete. Thus, the negative impact of legal involvement may be more significant for child than adult victims.

In addition, young children's lack of cognitive sophistication may make the legal system even more difficult to understand than it is for adult victims. By the intermediate (late elementary) grades, most children have an appreciation of the nature and purpose of the adversary system and an understanding of many legal concepts.[13] However, preschool and primary grade children often comprehend no more than the most rudimentary legal concepts (*i.e.*, police and judge), if any. Moreover, children involved in sexual abuse cases are even less knowledgeable, on average, than their peers. Given the fact that ambiguity generally fosters anxiety,[14] young children's lack of understanding of the legal process[15] is likely to add to the stress that they experience when they testify.

The stress of appearing in court and testifying in the presence of a defendant is added to the distress that many

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[13] Melton, Preparing Sexually Abused Children for Testimony: Children's Perceptions of the Legal Process, Reports to the National Center on Child Abuse and Neglect Pursuant to Grant No. 90-CA-1274 (available from counsel upon request).

[14] Dibner, Ambiguity and Anxiety, 56 J. ABNORMAL & SOC. PSYCHOLOGY 165 (1954).

[15] *See* Flin, Stevenson, & Davies, Children's Knowledge of Court Proceedings, 80 BRITISH J. PSYCHOLOGY 285 (1989); Melton, *supra* n.13; Saywitz, Children's Conception of the Legal System: "Court is a Place to Play Basketball," in PERSPECTIVES ON CHILDREN'S TESTIMONY 131 (S. Ceci, M. Toglia, & D. Ross, eds. 1989); Warren-Leubecker, Tate, Hinton, & Ozbek, What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, in PERSPECTIVES ON CHILDREN'S TESTIMONY 158 (S. Ceci, M. Toglia, & D. Ross, eds. 1989).

child victim-witnesses are already experiencing due to the trauma of the sexual abuse. A number of studies, some completed subsequent to this Court's decision in *Coy*, have examined children's reactions to legal involvement and courtroom testimony. Although testimony in *juvenile* court does not appear to result in significant, lasting distress for most children,[16] testimony in *criminal* court is, on average, associated with immediate as well as lasting distress.[17]

When the emotional well-being of children who testified in criminal court is compared to that of a matched group of children who were also involved as alleged victims in child sexual assault prosecutions but who did not have to testify, children who testified evidenced significantly greater distress 7-months post-testimony as well as after the final disposition of their cases.[18] The testifying children's distress was mainly manifested in greater depression, anxiety, and psychosomatic symptoms.

There is reason to believe face-to-face confrontation is a significant factor in child victim-witnesses' distress. Indeed, research shows that the most frequent fear ex-

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[16] Runyan, *supra* n.12.

[17] Goodman, *supra* n.12. The Goodman study was conducted through observation of criminal trials in three Colorado counties and interviews of child witnesses and their parents. Care must be taken, of course, in generalizing from this study to courts in other jurisdictions that apply other procedures. *See also* V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969) (survey of parents in Brooklyn and the Bronx about their children's response to the process in sexual abuse cases); Tedesco & Schnell, Children's Reactions to Sex Abuse Investigation and Litigation, 11 CHILD ABUSE AND NEGLECT 267 (1987) (survey of children in Iowa about their experiences in criminal courts).

[18] Goodman, *supra* n.12.

pressed by children awaiting testimony is a fear of facing the defendant.[19] When children are interviewed while waiting to testify or after they emerged from the courtroom, most children regardless of age mention facing the defendant as the most negative and frightening issue.[20] When asked how the legal process could have been made less stressful, children and parents most often mention use of closed-circuit television or videotaped testimony.[21]

Not all children are adversely affected, however, and some professionals believe that, if handled supportively, some children may benefit from the experience of testifying against their abusers.[22] This fact counsels against wholesale abrogation of the defendant's right to face-to-face confrontation, and in favor of careful case-by-case analysis of the likely impact on the child.[23] *See Ken-*

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[19] *Id.* Authorities have long believed that a significant amount of trauma and upset experienced by the child witness is due to the presence and proximity of the accused. Berliner and Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125 (1984); Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator? 17 New England L. Rev. 643 (1982); Whitcomb, *supra* n.3, at 17-18.

[20] Goodman, *supra* n.12; *see also* R. Flin, G. Davies & A. Tarrant, The Child Witness (1988) (similar findings for children in the United Kingdom).

[21] Goodman, *supra* n.12.

[22] Melton, Sexually Abused Children and the Legal System: Some Policy Recommendations, 12 Am. J. Family Therapy 61, 64-65 (1985) (summary of testimony on behalf of APA given before Senate Subcommittee on Juvenile Justice); Berliner & Barbieri, *supra* n.19.

[23] Goodman's work indicates that the experience of testifying sometimes is related to the child's general psychological well-being over an extended period of time. The fact that a child is anxious about testifying, however—even testifying face-to-face with the defendant—does not necessarily mean that the child will be harmed

tucky v. Stincer, 482 U.S. at 746, n.20 ("a court must . . . balance the defendant's role in assisting in his defense against the risk of identifiable and substantial injury to the specific child witness") (citing APA *amicus* brief).

Nevertheless, children who must testify more than once, children who lack maternal support when the abuse was disclosed, children whose cases lack corroborative evidence (so that proof of the crime rests primarily on the child's testimony), children whose abuse was severe, and children who were particularly frightened of the defendant when they testified, are most likely to show adverse effects of testifying.[24] Children who are more closely related to the defendant are also somewhat more distressed as a result of testifying than children who are less closely related to the defendant. Children with any

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by the experience. A substantial body of research involving adults shows that satisfaction with the legal process is highly related to the actual fairness of procedures, independent of the anxiety that participants experience. *See generally* E. Lind & T. Tyler, The Social Psychology of Procedural Justice (1988); Thibaut & Walker, A Theory of Procedure, 66 Cal. L. Rev. 541 (1978). Psychological research and theory on the significance of control—having a say—is also important to children in their evaluation of the legal process. Melton & Limber, Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise, 44 Am. Psychologist 1225, 1226-1227 (1989). By the middle elementary grades, most children understand the fairness of both sides having a say in legal disputes. Melton, *supra* n.13. Moreover, although children who are relatively knowledgeable about the legal process are especially likely to perceive victim-witnesses as more likely to be anxious, they also are especially likely to perceive the process as fair. *Id.*

[24] These propositions and the propositions contained in the balance of this paragraph are supported in Goodman, *supra* n.12. Clearly, some of these factors affecting children's response to testimony are not directly related to the procedures pursuant to which they testify. Nevertheless, fear of the defendant is a particularly important factor, and that factor is directly related to concerns about confrontation.

of these characteristics are likely to be at particular risk of enduring emotional distress. These are factors which may be evaluated on an individual basis to determine the necessity of protecting a child witness by using procedures that limit a defendant's right to a literal face-to-face confrontation with prosecution witnesses.[25]

One of the strongest predictors of distress—having to testify many times—is particularly relevant to the Maryland Court of Appeals' decision. The Court appeared to promulgate a rule requiring the child first to testify in front of the defendant, to establish the child's emotional distress and inability to testify, and then again on closed-circuit television if the face-to-face confrontation in fact proved traumatic. Following that Court's prescribed procedure would clearly cause a greater number of children to testify multiple times, thereby exacerbating these children's distress.[26] Also, recent research findings suggest that requiring children who are particularly frightened of the defendant to testify face-to-face to "test" whether closed-circuit televi-

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[25] Age is another factor that may be relevant. Developmental research shows that young children are especially likely to require special support in order to cope with stress. Maccoby, Social-Emotional Development and Response to Stressors, in STRESS, COPING AND DEVELOPMENT IN CHILDREN 219 (N. Garmezy & M. Rutter eds. 1988). Sometimes, however, young children are so uncomprehending that they are relatively unaffected by stressors that are powerful for older children and adults. *Id.* In that regard, the more children know about the legal system, the more they are likely to perceive witnesses as experiencing anxiety. Melton, *supra* n.13. Consequently, age alone cannot be used to determine the level of support that child witnesses require. Nevertheless, when young children do perceive the courtroom situation to be stressful (probably most situations in which the child is competent to testify), they will require extraordinary support to avoid substantial distress.

[26] Repeated interviewing of children about sex crimes in general has also been linked to greater distress in children. Tedesco & Schnell, *supra* n.17.

sion is necessary will result in increased distress in child victims.[27]

In sum, the high rate of moderate and severe emotional distress among potential child sexual abuse victim-witnesses does not justify an irrebuttable presumption that the child will suffer severe emotional distress as a consequence of testifying while confronting the defendant face-to-face. Because a great many of the potential child witnesses are indeed highly vulnerable, however, it is imperative that the court make particularized inquiries to determine the need for protective measures in each case.

II. PSYCHOLOGICAL THEORY AND DATA ABOUT THE DYNAMICS OF SEXUAL ABUSE VICTIMS' EMOTIONAL DISTRESS MAKE POSSIBLE INDIVIDUALIZED DETERMINATIONS ABOUT THE NEED FOR PROTECTIVE MEASURES WITHOUT REQUIRING VULNERABLE CHILDREN TO DIRECTLY CONFRONT THEIR ALLEGED ABUSERS IN EVERY CASE.

As noted in Point I, recent research findings strongly suggest that testifying face-to-face with the alleged abuser significantly increases the distress experienced by child victim-witnesses. As noted in Point III, *infra*, this distress has been shown in many cases adversely to impact the child's ability to testify completely and accurately about the alleged abuse, and may also distort the

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[27] *See* Goodman, *supra* n.12. Facing a fearful child with a feared person is similar to a technique called "flooding" used in behavior therapy. Flooding may lead to abreaction (strong reexperiencing of fearful past experiences). "Some abreactions are followed by therapeutic changes, while others are not and may leave the patient worse off than he was before. . . . The one apparent essential, to give it a chance of being beneficial, is for it to take place in a protected setting such as the psychotherapeutic relationship." If the stimulation is too strong, "the subject may 'switch off' or withdraw entirely." J. WOLPE, THE PRACTICE OF BEHAVIOR THERAPY 236-237, 246 (1982).

jury's evaluation of the truthfulness of the testimony. This interference with the truth-seeking process may justify protective measures in many cases. *Cf. Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (characterizing state's interest as one in "effective law enforcement, and . . . rules of evidence applicable in criminal proceedings"). Moreover, as noted in Point I, the data also strongly support the proposition that many children are seriously distressed by testifying face-to-face with their alleged abuser, and that the distress may be enduring. Avoidance of imposing emotional harm on the child victim-witness serves a compelling state interest independent of the truth-seeking goal of the criminal process.

Although research data concerning the factors that predict high stress and/or lasting distress for child victim-witnesses is still being developed,[28] clinical data and psychological theory provide a framework from which conclusions about this question may be drawn. The clinical and research data on child sexual abuse show that the overwhelming majority of children who are sexually abused are victimized by someone they know. The alleged perpetrator may be a parent, but more often a step-parent, a sibling, or another relative (*e.g.* uncle or cousin), or a person in an authority relationship to the child such as a baby-sitter, a child-care worker, a teacher, or a minister. "Overall, then, the stereotype of children being molested mainly by strangers is not accurate."[29] Greater trauma has been reported consistently when the abuser is a father or father figure, compared to all other perpetrators.[30]

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[28] Given ethical and practical constraints, systematic field research is extremely difficult to conduct in this area.

[29] J. HAUGAARD & N. REPPUCCI, *supra* n.6, at 47-48; Everson, Hunter, Runyon, Edelsohn, & Coulter, Maternal Support Following Disclosure of Incest, 59 AM. J. ORTHOPSYCHIATRY 197 (1989).

[30] Browne & Finkelhor, *supra* n.5.

Two well-known scholars on child abuse have postulated a theoretical model of what they call the 'traumagenic dynamics" of child sexual abuse.[31] Largely based on clinical experience and publications, and to a lesser degree on systematic research, this theoretical model is subject to further test. The model reflects the best judgment of two recognized experts about issues in child sex abuse cases, and provides a framework for analyzing the emotional consequences of a possible face-to-face encounter between the child victim-witness and a defendant known to the child.

Finkelhor and Browne identify four relevant factors: "traumatic sexualization," "betrayal," "powerlessness" and "stigmatization." Traumatic sexualization refers to a process of shaping a child's sexuality in developmentally inappropriate ways. Most sexual abuse, particularly when the alleged perpetrator is known to the child, does not involve force. Usually, a child is *rewarded* for sexual behavior by the perpetrator. "It occurs through the exchange of affection, attention, privileges, and gifts for sexual behavior." When force is employed, however, "a form of traumatic sexualization may occur as a result of the fear that becomes associated with sex in the wake of such an experience."[32] The fear, when present, may be rearoused in the presence of the defendant.

The complex experience aroused when kindness and affection are used as inducements to the child to submit to sexual activities introduces its own difficulties when the child confronts the defendant after being told that such encounters were wrong. Betrayal occurs when "children discover that someone on whom they were vitally dependent has caused them harm."[33] The strong

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[31] Finkelhor & Browne, The Traumatic Impact of Child Sexual Abuse, A Conceptualization, 55 AM. J. ORTHOPSYCHIATRY 530 (1985).

[32] *Id.* at 531.

[33] *Id.* at 531.

emotion of betrayal may be rekindled when the vulnerable child confronts a formerly trusted defendant.

The third factor is termed powerlessness. The "child's will, desires, and sense of efficacy are continually contravened [by the abuse]. . . . This is exacerbated by whatever coercion and manipulation the offender may impose as part of the abuse process." [34] When confronted by the defendant, the child may reexperience the sense of helplessness or powerlessness. The child may continue to fear the defendant's ability to harm the child, despite reassurance to the contrary.

The fourth factor is "stigmatization," which "refers to the negative connotations—*e.g.*, badness, shame, and guilt—that are communicated to the child around the experiences and then become incorporated into the child's self-image." [35] The child may be reluctant to reveal details of sexual abuse due to a sense of shame and guilt. "Pressure for secrecy from the offender can also convey powerful messages of shame and guilt." [36] As discussed in more detail in Point III, *infra*, confrontation may arouse these complex and powerful emotions and interfere with the child victim-witness' ability to communicate reasonably.[37]

A trial court need not subject a vulnerable child to the ordeal of testifying before the defendant to test whether such confrontation is likely to harm the child witness or impair the child's ability to testify.[38] Scien-

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[34] *Id.* at 532.

[35] *Id.* at 532-533.

[36] *Id.* at 533; *see also* Berliner & Barbieri, *supra* n.19.

[37] *See also* Burgess & Holmstrom, Rape: The Victim and the Criminal Justice System, in 3 VICTIMOLOGY: A NEW FOCUS 31-48 (1975); Rogers, Child Sexual Abuse and the Courts: Preliminary Findings, in SOCIAL WORK AND CHILD SEXUAL ABUSE 145-153 (J. Conte & D. Shore eds. 1982).

[38] The Maryland Court of Appeals' requirement that the court should attempt to elicit testimony from a child in a face-to-face con-

tific knowledge of the foregoing processes provides a basis for making an individualized determination of necessity to limit the defendant's Sixth Amendment confrontation rights in order to protect the child victim-witness, and—as discussed in Point III, *infra*—to meet another important state interest, namely to give the court the benefit of the child's best testimony. The presence and the influence of such factors may be developed by expert testimony based on a clinical therapist's experiences with a traumatized child. The trial court may receive guidance from such expert witnesses, bolstered where appropriate with testimony from parents, teachers, other confidants, or persons who have an opportunity to observe the child, sufficient to make an informed and fair decision that balances the State's interest in protecting a vulnerable child victim-witness and the truth-seeking process against the defendant's right to confrontation.[39]

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frontation before authorizing the one-way video procedure may be self-defeating. If the child is experiencing strong negative emotions in the presence of the defendant and is removed from the defendant's presence when the child does not answer questions, then the response of not testifying has been reinforced. The probability of not testifying in response to questions that provoke anxiety may therefore be increased. B. SKINNER, SCIENCE AND HUMAN BEHAVIOR 184-186 (1953); F. KELLER & W. SCHOENFELD, PRINCIPLES OF PSYCHOLOGY 61-62 (1950); A. GRAZIANO, CHILD WITHOUT TOMORROW 85-102 (1974); A. KAZDIN, BEHAVIOR MODIFICATION IN APPLIED SETTINGS 62-64 (1980).

[39] The New York Court of Appeals, upholding the constitutionality of New York's law authorizing two-way closed circuit testimony by a child declared vulnerable, noted approvingly that a variety of sources of evidence in addition to expert testimony might help to establish the "extraordinary circumstances" necessary to authorize two-way videotaped testimony. *People v. Cintron*, 1990 W.L. 1337 (N.Y.). *See also People v. Algarin*, 129 Misc. 2d 1016 (N.Y. Supp. 1987) (testimony of child victim's mother and statements of the prosecutor concerning child's out-of-court behavior; additionally child victim expressed "terror" of defendant, left the courtroom crying hysterically and hysteria continued for a time thereafter); *State*

III. IF A VULNERABLE CHILD VICTIM-WITNESS IS REQUIRED TO TESTIFY UNDER CONDITIONS OF HIGH EMOTIONAL AROUSAL, THE CONFRONTATION CLAUSE INTEREST OF PROVIDING RELIABLE TESTIMONY WILL NOT BE SERVED.

As the Court recognized in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and as Justice O'Connor noted in her concurring opinion in *Coy*, 108 S. Ct. at 2804, there are often no witnesses to the crime of sex abuse except the perpetrator and the victim. The child victim-witnesses' testimony is therefore crucial if the State is to convict a guilty person; truthful testimony is obviously also essential to an innocent defendant seeking a verdict of not guilty.

The premise of the Confrontation Clause is that it is more difficult for a witness to lie, and more likely that the trier of fact will be able to detect lying from the witness' demeanor, if the witness must accuse the defendant to his face. *Coy*, 108 S. Ct. at 2800-2802. This premise may have limits, however, when applied to child witnesses.

A. The Completeness of Children's Testimony is Influenced by Conditions of Emotional Arousal.

A child victim-witness testifying under conditions of heightened emotional arousal is most likely to refuse to testify, to be unable to verbalize answers to questions, or

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v. Tafova, 765 P.2d 1183 (N.M. App. 1988), *cert. denied*, 109 S.Ct. 1572 (1989) (full day of uncontroverted expert testimony of child's trauma); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989) (testimony of child's mother, the child's guardian *ad litem*, the social worker who was trained in dealing with sexually abused children, and the child's pediatrician).

New York Criminal Procedure Law § 65.20.9 (a-1) specifies twelve factors to be considered in making this judgment. These factors may be evaluated in a hearing and may be used to establish that a vulnerable child victim-witness may require the protection of closed-circuit television to allow the child to testify without imposing undue further distress on the child.

to be tearful.[40] Moreover, the presence of the defendant in and of itself may affect children's ability or willingness to describe events accurately. Children are more likely to refuse to identify a culprit when he is physically present than when his picture is presented in a photo lineup.[41] Research studies indicate that correct identifications occur only half as often when children face the defendant as when they do not have to face the defendant.[42] Children show noticeable signs of nervousness, fear, and anxiety when having to face the defendant. Thus children's anxiety adversely affects their per-

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[40] The behavior of the child described in *People v. Cintron*, 1990 W.L. 1337 (N.Y.), is probably not atypical of distressed child victim-witnesses:

> "It is not disputed that Jennifer [then five years old] was reluctant to testify at this hearing or that while generally responsive to questions posed to her, she gave no verbal responses, but communicated only by shaking her head. . . . Jennifer was called as a witness, but she looked at the defendant's direction and was extremely reluctant to take the stand. Without objection, the court directed that defendant be removed from the courtroom so that it could observe Jennifer outside defendant's presence. . . . [A]gain, Jennifer was generally responsive to questions, but she did not verbalize her answers. . . . After Jennifer had been on the stand for approximately two hours, the district attorney began questioning Jennifer about the details of the incident. She did not respond to these questions and remained unresponsive when asked to demonstrate what occurred using anatomically correct dolls."

In that case, even in the absence of the defendant, the child had great difficulty in verbalizing her responses, but eventually did respond verbally. *Id.* at 28.

[41] Dent, Stress as a Factor Influencing Person Recognition in Identification Parades, 30 BULL. OF THE BRITISH PSYCHOLOGICAL SOCIETY 339 (1977); D. Peters, The Effects of Event-Stress and Stress During Lineup Identification on Eyewitness Accuracy in Children, in D. Peters, Chair, Children's Eyewitness Testimony (1988) (paper presented to American Psychology-Law Society Meeting, Miami, Florida) (available from counsel upon request).

[42] Dent, *supra* n.41; Peters, *supra* n.41.

formance, with fears leading children not to reveal what they know. Moreover, the same research shows that the absence of a face-to-face encounter does not increase children's errors of identification.[43]

Even under the controlled conditions of research studies, children can be silenced by fear or apprehensiveness. For example, many children who witness or experience an event in the presence of a stranger or loved one can be easily silenced about the event when told by that person not to tell.[44] Children's main error in such circumstances is the withholding of information.

In contrast, providing a supportive atmosphere can improve children's accuracy. Young children are less suggestible in response to leading questions, including questions about abuse-related actions, when interviewed in a reinforcing and supportive manner.[45] Thus, testimony in a supportive atmosphere may decrease commission errors (false affirmations). The presence of a supportive person (a child's friend) leads to more accurate testimony.[46]

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[43] Dent, *supra* n.41; Peters, *supra* n.41.

[44] Bottoms, Goodman, Schwartz-Kenny, Sachsenmaier, & Thomas, Keeping Secret: Implications for Children's Testimony (Paper presented at American Psychology-Law Society Meetings, Williamsburg, Virginia, 1990) (available from counsel upon request); Clarke-Stewart, Thompson, & Lepore, Manipulating Children's Interpretations Through Interrogation, in G. Goodman, Chair, Do Children Provide Accurate Eyewitness Reports? Research and Social Policy Implications (Symposium Presentation at Society for Research in Child Development Meeting, Kansas City, Missouri 1989) (available from counsel upon request).

[45] Goodman, Rudy, Bottoms, & Aman, Children's Memory and Concerns: Ecological Issues in the Study of Children's Testimony, in WHAT YOUNG CHILDREN REMEMBER AND WHY (R. Fivush & J. Hudson eds. in press) (available from counsel upon request).

[46] S. Moston, The Effects of the Provision of Social Support in Child Interviews (1989) (paper presented at the British Psychological Society Meeting, York, UK) (available from counsel upon request).

One study indicated that children who testify in a simulated courtroom in front of the defendant are more likely to omit information by saying "I don't know" and are also somewhat more likely to recall less correct information than children who testify in a private room without the defendant present, as in one-way closed circuit television arrangements.[47] Testifying in court in front of the defendant results in less complete (and even somewhat less accurate) testimony compared to testimony taken in a more sheltered environment. Moreover, children who have to face the defendant and testify in court may then refuse to do so again at another time. Overall, laboratory studies indicate that the accuracy and completeness of children's testimony is adversely affected when child witnesses must confront the defendant or testify in an unsupportive atmosphere.

How does facing the defendant affect children's testimony in actual court cases? When children testify as sexual assault victims in criminal court trials, fear of the defendant is associated with children being less able to answer the prosecutor's questions and with children later believing that testifying had an adverse effect on their lives.[48] Thus, in the presence of the defendant, many children are less communicative—and less accurate—witnesses.

B. A Child Witness' Lack of Completeness in Testifying Influences Juror Perceptions of Credibility, But Does Not Necessarily Enhance The Accuracy of Juror Perceptions of Truthfulness or Lying.

Adults tend to judge child witness credibility based on several factors. When children take the stand as sexual

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[47] Hill & Hill, Videotaping Children's Testimony: An Empirical View, 85 MICH. L. REV. 809 (1987).

[48] Goodman, *supra* n.12.

assault victims, signs of distress (*e.g.*, crying, fearfulness) generally enhance their credibility.[49] Children who provide detailed, consistent, or confident testimony are also viewed as particularly credible witnesses.[50] However, studies show that confidence and detail of testimony are not particularly valid indicators of accuracy, and reliance on them may lead to error.[51]

Given that a face-to-face encounter often may limit the amount of detail a child can report, children may be viewed as less credible when they testify in court than on closed-circuit television. Under conditions of a child victim-witness' heightened emotional arousal, a guilty defendant would have the advantage of jurors' tendencies to discredit testimony due to the typical child victim-witness' uncertain manner of presentation. The imposition of emotional distress may therefore distract jurors from focusing on what may be more valid indicators of children's accuracy in testifying. Furthermore, if the child is unable to testify in a face-to-face confrontation with the defendant, the State may be deprived of testimony that could result in the conviction of a guilty defendant. Even if the child is later permitted to testify

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[49] Goodman, *supra* n.12; Melton, *supra* n.13.

[50] Goodman, Bottoms, Herscovici, & Shaver, Determinants of the Child Victim's Perceived Credibility, in PERSPECTIVES ON CHILDREN'S TESTIMONY 71 (S. Ceci, D. Ross, & M. Toglia eds. 1989); Wells & Leippe, How do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can Be Misleading, 65 J. APPLIED PSYCHOLOGY 682 (1981); Wescott, Davies & Clifford, Lying Smiles and Other Stories: Adults' Perceptions of Children's Truthful and Deceptive Statements (paper presented at First European Congress of Psychology 1989); Nigro, Buckley, Hill & Nelson, When Juries "Hear" Children Testify: The Effects of Eyewitness Age and Speech Style on Jurors' Perceptions of Testimony, in PERSPECTIVES ON CHILDREN'S TESTIMONY 57 (S. Ceci, D. Ross & M. Toglia eds. 1989).

[51] Goodman, Bottoms, *et al.*, *supra* n.51; Wells & Leippe, *supra* n.51.

pursuant to protective measures, the traumatic experience of confrontation may continue to render him or her silent and emotionally unable to speak.

APA is unaware of completed empirical research that directly examines the effects of protective measures on jurors' abilities to detect intentional deception by children or on possible prejudicial effects of protective measures. But research on these issues is currently underway. At present, three large-scale studies are being conducted in this country, and several other studies are being carried out abroad, to evaluate the use of protective measures when children testify. Much of this research examines the emotional effects of protective measures on child sexual assault victims, in criminal court prosecutions, and the influence of such measures on jurors' decisions. Other studies are examining, in realistic mock jury research: jurors' abilities to reach the truth and to detect lying when children testify via closed-circuit television; jurors' perceptions of fairness when such procedures are employed; and the accuracy and completeness of children's reports when children are required to testify in court either facing the accused or not facing the accused, or when testifying via two- or one-way closed-circuit television. When complete, findings from such studies will aid the courts in reaching a fair balance between the need to protect child victim-witnesses from emotional distress while promoting reliable testimony, on the one hand, and the need to protect defendants' rights to confront witnesses who testify against them, on the other.

CONCLUSION

For the foregoing reasons, APA respectfully submits that the State has a compelling interest in protecting a vulnerable child victim-witness; that determinations whether that interest is implicated must be made case-by-case for each particular child; and that it is not necessary in every case to subject a young child victim-witness to the ordeal of attempting testimony face-to-face with the defendant before allowing the child to testify by means of one-way or two-way closed-circuit television. Instead of adhering to the Maryland Court of Appeals' recommendations, which would subject some vulnerable children to unnecessary emotional harm, multiple sources of information, including expert testimony, should be sought in making an individualized determination whether there is a need to limit the defendant's right to face-to-face confrontation when a particular child victim testifies. A "trial run" with attendant traumatization should not invariably be required before the court makes its individualized determination.

Respectfully submitted,

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Case No. 89-478

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICUS CURIAE*

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*The States joining in this brief are listed in Appendix A of this brief.

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QUESTION PRESENTED

WHERE CASE-SPECIFIC FINDINGS REGARDING THE NEED TO PROTECT CHILD VICTIMS ARE MADE AND THE WITNESSES, AGES FOUR TO SIX, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, DOES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE IS USED?

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INTEREST OF AMICUS CURIAE

The State of Florida, as amicus curiae (along with those states and jurisdictions joining in this brief*), expresses deep concern with the decision of the Court of Appeals of Maryland. Unless the United States Supreme Court overturns this decision, it could have a detrimental effect nationwide on statutes designed to both elicit truthful testimony from the victims of child sexual abuse, and to minimize the trauma associated with testifying in court.

At present, thirty states have enacted laws providing for closed-circuit televised testimony of child victims or witnesses in lieu of testimony in the courtroom. The Maryland statute at issue here is characteristic of this national trend reflecting greater awareness of the unique and difficult position of abused children who must be witnesses in criminal prosecutions. Rejection of Maryland's procedure for protecting child victims of abuse will weaken national efforts aimed at successfully prosecuting these crimes against society's most helpless victims.

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* The States and jurisdictions joining this brief are listed infra in Appendix A.

The various state laws or rules providing for the use of closed-circuit televised testimony of child victims are listed infra in Appendix B.

ARGUMENT

The Amicus States agree with Petitioner Maryland that the protection of child abuse victims is an issue of great public importance, and that the decision below represents an erosion of that protection.

Child sexual abuse has grown to extraordinary proportions in recent years. Studies indicate that during childhood approximately 20% of all females and 10% of all males are sexually molested by an adult.[1] Sexual abuse cases are exceptionally difficult to prosecute because the child victim is usually the only witness to the crime.[2]

Under traditional court procedures, the child may be found incompetent to testify, or upon testifying may be unable to recall crucial details or relate them to the jury.[3] For example, children are often reluctant witnesses and sometimes retract prior testimony to absolve an assailant who is a family member.[4]

Child therapists maintain that children often fall apart or retract their accusations on the witness stand because they are frightened by the defendants.[5] Parents sometimes decline to press charges rather than subject their abused children to litigation requiring repetition of a traumatic episode.[6]

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1 D. Finkelhor, *Sexually Victimized Children* 53 (1979).

2 Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim.Just.J.1 (1983).

3 *See*, A. Yarney, *The Psychologyee of Eyewitness Testimony* 204-5 (1979).

4 D. Finkelhor, *Child Sexual Abuse* 2-3 (1984).

5 *Closed-Circuit Television Testimony for The Sexually Abused Child: The Right to Avoid Confrontation*, 27 Santa Clara L. Rev. 117 (1987).

6 Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 807 (1985).

> The significant conflicts among the interests of the state, the defendant and the victim come into sharpest focus in child sexual abuse cases. The only eyewitness is usually a child of tender years who has been betrayed by a powerful, trusted adult. Asking such a witness to understand, not to be afraid, and to respond in a courtroom as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted.[7]

Several researchers have determined that traditional court procedures add to a child's psychological scars, producing "system-induced trauma."[8] Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very existence of the child's testimony.[9] The child can become so intimidated by the presence of the defendant that he or she cannot speak about the incident.[10]

In *State v. Sheppard*, the Superior Court of New Jersey noted:

> An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious

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7 Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, Children's Legal Rts.J., Fall 1984, at 12.

8 Colby & Colby, *Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example*, 66 Child Welfare 25 (1987); Conte, *The Justice System and Sexual Abuse of Children*, 58 Social Serv. Rev. 556-568 (1984); Libai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 982 (1969).

9 Hill & Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev., 809 note 21 at 820 (1987).

10 *Id.* at 827.

> overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony.[11]

Heightened media attention has increased the public's awareness of the problem of child sexual abuse.[12] This awareness has resulted in an increase in reported cases which has led to a major law reform movement to better handle those cases coming into the criminal justice system.[13] One important evidentiary innovation aimed at protecting child sexual abuse victims from further trauma is the enactment of laws providing for the taking of the child victim's testimony via closed-circuit television.

The American Bar Association recommends that "(w)hen necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses

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11 *State v. Sheppard*, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984).

12 Bulkley, *Introduction: Background and Overview of Child Sexual Abuse*, 40 U. Miami L. Rev. 5, 6, (1985).

13 *Id.*

who testify in the particular courtroom,"[14] and "(w)hen necessary, the child should be permitted to testify via closed-circuit television . . . so long as the defendant's right to cross-examine is not impaired."[15]

CLOSED CIRCUIT TELEVISION STATUTES

At present, thirty states have enacted provisions allowing closed-circuit televised testimony at trial where abuse of a child is alleged.[16] These laws provide guidelines for trial judges to use in determining whether the child will suffer trauma as a result of testifying in the courtroom or in the defendant's presence, or whether the child's trauma will prevent the child from testifying truthfully or even testifying at all.

It must be stressed here that a primary interest and *raison d'etre* of these provisions is to assure the integrity of the fact-finding process.[17] In drafting the various provisions, state legislatures took into consideration the need to strike a balance between society's interest in justice and protection of its child victims and, on the other hand, the constitutional rights of criminal defendants. Of such efforts one commentator has written:

> Society has a substantial and compelling need to protect child sexual abuse victims from further psychological and emotional harm. Society also has a compelling need to preserve the rights of defendants. These two needs, however, are not

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14 *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*, 110 Annual Report of the American Bar Association 943 (1985).

15 *Id.*

16 *See* , Appendix B, *infra*.

17 *See, e.g.*, Chapter 85-53, Laws of Florida.

> mutually exclusive. They must be balanced against each other, and their respective weights determined. Indeed, since [testimony via closed-circuit television] can be used without any substantial infringement of a defendant's rights and because the need to protect the victimized child witness is overwhelming, the scale must tip towards the child.[18]

The statement contained in California Penal Code § 1347(a) (1987), is representative of this legislative purpose:

> It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

The various state enactments authorizing the use of televised testimony are procedurally similar. The child witness is normally removed to a suitable setting outside the courtroom. The only other parties typically present with the child are the prosecutor, defense counsel, the camera personnel, and a person whose presence would contribute to the welfare and well-being of the child.[19] The statute may also provide that the support person shall not coach, cue, or influence the child's testimony.[20]

The jury and the defendant remain in the courtroom. When testimony is transmitted to the courtroom via simultaneous electronic means, the statutes may require that the trial court ensure that the courtroom is equipped with monitors that permit the jury, the defendant, and all others present to see and hear the transmission;[21] that the transmission is in color;[22] that the child is visible on the monitor at all times;[23] that every voice transmitted is audible and identified;[24] that the transmission is not altered in any way.[25]

Most importantly, to satisfy the confrontation clause concern of effective cross-examination, the procedure must allow the defendant to be in constant communication with

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18 Comment, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 San Diego L. Rev. 919 938 (1986).

19 *See, e.g.*, Alaska Stat. Supp. § 12.45.046(c)(C)(2) (1988); Cal. Penal Code § 1347(f) (1989); Fla. Stat. § 92.54(3) (1989); Ga. Code Ann. § 17-8-55 (1989); Ind Code Ann. § 35-37-4-8(e)(2) (1989); Md. Cts. & Jud. Proc. Code Ann. § 9.102(b)(1)(iv)(1989); Minn. Stat. Ann. § 595.02(b) (1988); Tex. Crim. Proc. Code Ann. Art. 38.071 Sec. 3(a) (1989); R.I. Gen. Laws § 11-37-13.1 (1988); Utah Code Ann. § 77-35-15-5(2)(a) (1989); Vt. R. Evid. 807(d); Va. Code § 18.2-67.8(c) (1988).

20 *See, e.g.*, Cal. Penal Code § 1347(d)(4) (1989).

21 *See, e.g.*, Cal. Penal Code § 1347(b) (1989); Mass. Gen. Laws, Ann. Ch. 278:16D(b)(7)(d) (1989).

22 *See, e.g.*, Mass. Gen. Laws Ann. Ch. 278:16D(b)(7)(b).

23 *See, e.g., id.*

24 *See, e.g.*, Ariz.Rev.Stat.Ann. § 13-4253(B)(3) (1988); Kan.Stat.Ann. § 38-1558(a)(2)(C) (1988).

25 *See, e.g.*, Ariz.Rev.Stat.Ann. § 13-4253(B)(3) (1988); Kan.Stat.Ann. § 38-1558(a)(2)(B) (1988); Ohio Rev.Code Ann. § 2907.41(D) (1987).

his attorney during the child's testimony. This is usually accomplished through a private telephone line or other means of constant private communication.[26] Thus the defendant's opportunity for cross-examination is not impaired.[27]

Some states also provide for two-way closed circuit televised testimony.[28] Not only is the child's image broadcast into the courtroom, but the image of the defendant is also transmitted to a monitor in full view of the child.

Contemporaneous televised testimony adheres closely to the giving of testimony in the traditional courtroom setting, except that the child is not in the physical presence of the defendant. Televised testimony is thus the functional equivalent of testimony within the courtroom.[29]

The majority of closed-circuit statutes contemplate only the testimony of child victims, but some allow the testimony of other children who are witnesses to the abuse.[30]

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26 *See, e.g.*, Fla. Stat. § 92.54(4) (1989); Mass. Gen. Laws Ann. Ch. 278:16D(b)(5) (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102(b)(3) (1989); Miss. Code Ann. § 13-1-405(4) (1987); N.J. Stat. Ann. 2A:84A-32.4(d) (1989).

27 *See, e.g., State v. Vess*, 157 Ariz. 236, 756 P.2d 333 (Ariz. App. 1988); *People v. Algarin*, 129 Misc.2d 1016, 498 NYS 2d 977 (1986).

28 *See, e.g.*, Cal. Penal Code § 1347 (1989); Haw. R. Evid. 616.; Idaho Code § 19-30204A (1989); N.Y. Crim. Proc. Law §§ 65.00-.30 (1989); Ohio Rev. Code Ann. § 2907.41 (1987); Vt. R. Evid. 807; Va. Code § 18.2 - 67.8 (1988).

29 *See, e.g., Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986); *State v. Jarzbek*, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987), *cert. denied*, ___ US ___, 108 S.Ct. 1017 (1988).

30 *See, e.g.*, Ala. Code § 15-25-3 (1988); Ariz. Rev. Stat. Ann. § 13-4253 (1988); Alaska Stat. § 12.45.046 (1988); Fla. Stat. § 92.54 (1989); Mass. Gen. Laws Ann. Ch. 278 § 16D (1989); N.J. Stat. Ann. § 2A:84A-32.4 (1989); Pa. Cons. Stat. Ann. tit. 42 § 5985 (1989); Utah Code Ann. § 77-35-15.5 (1989).

The states vary as to the age qualifications of the child witnesses. Some statutes require that the child be ten years old or less[31] while others require that the child be seventeen years old or less.[32]

The standards which the trial courts must satisfy and the findings they must make in order to take a child's testimony via closed-circuit television also vary. Some statutes mention no standards at all.[33] Others require only that testimony be televised "for good cause shown,"[34] or "when justice so requires,"[35] or when "it is in the best interest of the child."[36]

The majority of closed-circuit statutes set forth more detailed standards or factors for the trial court to consider. Most require that the court determine whether the child will suffer mental or emotional trauma if required to testify either in the courtroom or in the presence of the defendant or both.

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31 *See, e.g.*, Cal. Penal Code § 1347 (1989); Ind. Code Ann. § 35-37-4-8 (1989); Minn. Stat. Ann. § 595.02 (1988).

32 *See, e.g.*, Ala. Code 15-25-3 (1988); Fla. Stat. § 92.54 (1989); Haw. R. Evid. 616; Md. Fam. Law Code Ann. § 5-701(d) (1989 Supp.); N.J. Stat. Ann. 2A:84A-32.4 (1989). Rhode Island is an exception. R.I. Gen. Laws § 11-37-13.2 (1988) requires that the child be seventeen years of age or less at time of trial, there is a rebuttable presumption that the child is unable to testify before the court without suffering "unreasonable and unnecessary mental or emotional harm".

33 *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4253 (1988); Haw. R. Evid. 616; Iowa Code § 910A.14 (1989); Kan. Stat. Ann. § 22-3434 (1988); Ky. Rev. Stat. Ann. § 421.350 (1989); Okla. Stat. Ann. tit. 22 § 753 (1989). Where no standards are articulated by the legislature, the courts in some states have stepped in to fill the gap. *See, e.g., State v. Draper*, ___ Ariz. ___, 784 P.2d 259 (Dec. 6, 1989); *State v. Eaton*, 244 Kan. 376, 769 P.2d 1157 (1989); *Commonwealth v. Willis*, 716 S.W 2d 244 (Ky. 1986).

34 Ala. Code § 15-25-3 (1988); Pa. Cons. Stat. Ann. tit. 42 § 5985 (1989).

35 La. Rev. Stat. Ann. § 15:283 (1989).

36 Ill. Ann. Stat. Ch. 38 § 106A-3 (1989).

Massachusetts Gen. Laws Ann. Ch. 278:16D(b)(1) (1989) requires that the court find by a preponderance of the evidence that the child witness is "likely to suffer psychological or emotional trauma" as a result of testifying in open court, in the presence of the defendant, or both.

Indiana Code Ann. § 35-37-4-8 (d)(1)(C) (1989) requires that the court find that "it is more likely than not that the child's testifying in the courtroom would be a traumatic experience," based on evidence which may include a psychiatrist's certification of resultant trauma.

Minnesota Stat. Ann. § 595.02(4)(c) (1988) requires that the court determine that the presence of the defendant during testimony would "psychologically traumatize the witness so as to render the witness unavailable to testify."

Florida Stat. § 92.54(1) (1989) requires that the court hold a hearing in camera to determine whether "there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court". Specific findings of fact on the record are also required.

Alaska Stat. § 12.45.046(a)-(b) (1988) requires that the court make a determination that testimony under normal court procedures "would result in the child's inability to effectively communicate," and lists factors to consider including the child's age, development, health, physical, emotional, or psychological injury, and mental or emotional strain that will be caused by in-court testimony.

Connecticut Public Act No. 89-177 amended Conn. Gen. Stat. Ann. § 54-86g (1989) to provide that the defendant may be excluded from the sight and hearing of the child only if the state proves "by clear and convincing evidence that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need

exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony."

California Penal Code § 1347 (1989) permits closed-circuit testimony if the child's testimony will involve recitation of the facts of an alleged sexual offense committed on or with the child, and the impact on the child of one or more of a listed series of factors is "shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used." These factors include threats to the child or a family member, use of a weapon during the incident, injury to the victim, or conduct on the part of the defendant or defense counsel which causes the minor to be unable to continue his or her testimony. The court may question the child out of the defendant's presence and must make a statement on the record in support of its order.

Vermont R. Evid. 807(c) requires that the court make a finding that "requiring the child to testify in court will present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify."

New York Crim. Proc. Law § 65.10 (1989) requires that the court determine by clear and convincing evidence that "it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the

use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm."[37]

In order to find the existence of "extraordinary circumstances," a New York trial judge may consider whether any of twelve enumerated factors apply.[38] The court shall make findings of fact supporting a finding of the child's vulnerability and may enter an order permitting closed-circuit testimony if "under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired . . . ."[39] The court shall make a finding as to whether the defendant's presence will contribute to the likelihood that the child will suffer severe mental or emotional harm.[40]

New Jersey Stat. Ann. § 2A:84A-32.4(b) (1989) requires that the trial court find that there is "a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court." The order must specify who will be excluded from the child's physical presence and "shall be based on specific findings relating to the impact of the presence of each."

Georgia Code Ann. § 17-8-55 permits closed-circuit testimony only if the court finds that "there is a substantial likelihood that such child will suffer severe emotional or

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37 The New York Legislature enacted this procedure on an experimental basis in 1985 for three years, and extended it for a second three year period to expire November 1, 1991. N.Y. Crim. Proc. Law § 65.00 (1989). The State of New York Court of Appeals has held Article 65 to be facially constitutional. *People v. Cintron*, ___ N.Y.2d ___, ___ N.E.2d ___ (decided January 11, 1990).

38 N.Y. Crim. Proc. Law. § 65.20(9) (1989) (these factors are listed *infra* in Appendix C).

39 § 65.20(11).

40 § 65.20(12).

mental distress if required to testify in open court," and "the rights of the defendant will not be unduly prejudiced."

Maryland Cts. & Jud. Proc. Ann. § 9-102 (1989), the statute before this Court, requires that the judge determine that the child's testimony in the courtroom will result in the child suffering "serious emotional distress such that the child cannot reasonably communicate."

Ohio Rev. Code Ann. § 2907.41 (1987) authorizes a judge to order closed-circuit testimony if the judge determines that the child is "unavailable" to testify in the defendant's presence if one or more factors are present. Those factors include the child's persistent refusal to testify despite the judge's request, inability to tell about the alleged violation because of extreme fear, failure of memory, or other similar reason, and/or the substantial likelihood that the child will suffer "serious emotional trauma from so testifying." The judge must enter his determination and findings on the record.

Virginia Code § 18.2-67.8 (1988) authorizes a trial court to take a child victim's testimony by closed-circuit television if it finds that the child is "unavailable" to testify in open court if the child persistently refuses to testify despite judicial requests, or the child is substantially unable to communicate about the offense, or there is a substantial likelihood, based on expert testimony, that the child "will suffer severe emotional trauma from so testifying." The court's ruling on unavailability must be supported by findings on the record.

Although the stated standards of the various states may differ somewhat, it is clear that the objectives and concerns are the same. It is important for this Court to note that before a child victim is excluded from testifying in the presence of the jury and the accused on the premise that the child is suffering or will suffer additional injury, the basis

for such a premise is established both in fact as well as logic pursuant to a trial judge's reasoned determination.

Amicus Curiae and the states and jurisdictions joining this brief submit that the use of closed-circuit televised testimony in lieu of testimony in the courtroom affords a defendant the primary protections envisioned by the confrontation clause of the Sixth Amendment to the United States Constitution. *See Commonwealth v. Willis, infra.*

Even in the case of a state constitution that specifically states that the accused has the right "to meet the witnesses *face to face,*"[41] (emphasis supplied), at least one court has held that a statute allowing the closed-circuit televised testimony of a child victim satisfies that constitutional requirement. In *Commonwealth v. Willis,* the Supreme Court of Kentucky demonstrated how these interests can be reconciled:

> The sections of the statute apply only to a narrow class of witnesses, children twelve years old or younger who are victims of sex offenses. They impose no restrictions on cross-examination; allow the finder of fact to observe the demeanor of the witness and require that defendant be present to see and hear the testimony. The law is available at the discretion of the trial judge in the interest of the truth determining process. The appropriate balancing of the competing interests of the right of confrontation and the right of a witness to be free of intimidation favors the constitutionality of the statute. *See Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).[42]

41 *See, e.g.,* Kentucky Constitution, § 11.

42 *Commonwealth v. Willis, supra* at 227, 228. *But see Commonwealth v. Bergstrom,* 402 Mass. 534, 524 N.E.2d 366 (1988) (State Constitution affords specific right to direct confrontation).

The Kentucky Supreme Court further recognized that there is no constitutional right to "eyeball to eyeball" confrontation,[43] and that the choice of the words "face to face" were a possible result of "an inability to foresee technological developments permitting cross-examination and confrontation without physical presence."[44] The court went on to state:

> The use of video or television equipment as a substitute for personal appearance, either in trial or in deposition, requires the Commonwealth to demonstrate that such use is reasonably necessary and to provide the technical details whereby the testimony will be taken with the child screened from the sight and hearing of the accused, while at the same time, the defendant can view and hear the child and maintain continuous audio contact with his defense counsel. Consequently, the only incursion on the defendant's right of confrontation is that the child is not required to look at the defendant's face or listen to his comments.
>
> There is no authority under traditional court room procedures which specifically requires any witness to look at the defendant. A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that

43 *Id.* at 230.

44 *Id.*

> she cannot testify unless she is unable to see or hear him.
>
> The strength of the State and Federal Constitutions lies in the fact that they are flexible documents which are able to grow and develop as our society progresses. The purpose of any criminal or civil proceeding is to determine the truth. KRS 421.350 provides such a statutory plan while protecting the fundamental interests of the accused as well as the victim.[45]

Amicus Curiae and the states and jurisdictions joining this brief strongly urge this Court to reverse the ruling of the Maryland Court of Appeals as that court overextended Confrontation Clause precepts without giving due weight to the compelling public interest of protecting child sex abuse victims. An adequate showing of the probability of emotional or mental trauma can be made without requiring the presence of the defendant at the pretrial hearing by using expert psychological evaluation and testimony as well as personal observation of the victim by the trial judge.[46]

Closed-circuit statutes which require case-specific determinations of necessity accomplish the constitutional task of affording the defendant his right of confrontation while also protecting the rights of children. The ruling of the Maryland court of appeals creates conflict between Maryland and the plurality in *Coy v. Iowa*[47] and the other state decisions discussed by Petitioner in its brief. The result is the imposition of an unrealistic procedure which will result in further harm to child sex abuse victims without contributing to a

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45 *Id.* at 231.

46 *See, The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child,* 42 U. Miami L. Rev. 1033 (1988).

47 487 US ____, 108 S.Ct. 2798 (1988).

criminal defendant's Sixth Amendment right to confrontation.

CONCLUSION

Amicus Curiae and the states and jurisdictions joining this brief respectfully urge this Honorable Court to reverse the ruling of the Court of Appeals of Maryland in the case sub judice.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICUS CURIAE*

APPENDIX

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APPENDIX B

PROVISIONS ALLOWING FOR USE OF ONE-WAY CLOSED-CIRCUIT TELEVISION

Alabama: Ala. Code § 15-25-3 (Supp. 1988).

Alaska: Alaska Stat. § 12.45.046 (Supp. 1988).

Arizona: Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988).

Connecticut: Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989) (amended by Conn. Public Act 89-177 (1989).

Florida: Fla. Stat. § 92.54 (West Supp. 1989).

Georgia: Ga. Code Ann. § 17-8-55 (Supp. 1989).

Illinois: Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989).

Indiana: Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989).

Iowa: Iowa Code Ann. § 910A.14 (West Supp. 1989).

Kansas: Kan. Stat. Ann. § 22-3434 (1988).

Kentucky: Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989).

Louisiana: La. Rev. Stat. Ann. § 15:283 (West Supp. 1989).

Maryland: Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1987).

Massachusetts: Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989).

Michigan: Mich. Comp. Laws § 600.2163a (1989).

Minnesota: Minn. Stat. Ann. § 595.02 (West 1988).

New Jersey: N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989).

Oklahoma: Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989).

Pennsylvania: Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989).

Rhode Island: R.I. Gen. Laws § 11-37-13.2 (Supp. 1988).

Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989).

Utah: Utah Code Ann. § 77-35-15.5 (Supp. 1989).

Vermont: Vt. R. Evid. 807.

PROVISIONS ALLOWING FOR USE OF TWO-WAY CLOSED-CIRCUIT TELEVISION

California: Cal. Penal Code § 1347 (West Supp. 1989).

Hawaii: Haw. R. Evid. 616.

Idaho: Idaho Code § 19-30204A (1989).

Minnesota: Minn. Stat. Ann. § 595.02(4)(c)(2) (West 1988).

New York: N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989).

Ohio: Ohio Rev. Code Ann. § 2907.41 (Page 1987).

Vermont: Vt. R. Evid. 807.

Virginia: Va. Code § 18.2-67.8 (1988).

APPENDIX C

New York Criminal Procedure Law § 65.20(9) (1989)

9. The court may consider, in determining whether there are such extraordinary circumstances as would cause the child witness to suffer severe mental or emotional harm, a finding that any one or more of the following factors have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense of offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grant jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grant jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of the inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness.

(k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law.

(l) According to expert testimony, the child witness would be particularly susceptible to psychological harm if required to testify in open court or in the physical presence of the defendant.

(12)

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No. 89-478

IN THE

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STATE OF MARYLAND,

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vs.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

1. CJLF has received written consent of the parties to file this brief.

CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to a fair, swift, orderly system of justice.

The decision of the Maryland Court of Appeals in the present case prevents the state from taking measures to lessen the trauma to a molested child of having to face his molester in open court. The Maryland Court used the Sixth Amendment's Confrontation Clause to force the molested child to confront his accused molester before the state could take measures to lessen the trauma of an in-court confrontation. This unnecessary expansion of defendant's right to confrontation at the expense of the victim is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On October 16, 1986, Respondent Sandra Ann Craig, the operator of a preschool in Howard County, Maryland, was indicted for child abuse, first and second degree sexual offenses, assault, perverted sexual practice and battery. Petition for Writ of Certiorari ("Pet."), at 4. The victim named in each count was Brooke Etze, who attended Craig's preschool from August 1984 to June 1986. *Ibid.*

Several months before Craig's trial, Maryland moved to have four children testify at trial over one-way closed-circuit television. *Ibid.* The statute used to support this motion, section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Code, requires that a judge first find "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate," Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii), before letting the child testify over television. Maryland invoked this statute to protect Brooke, then seven years old, and three younger children who allegedly

had been abused by Craig and were expected to be called as witnesses at Craig's trial. Pet. at 4.

A pretrial hearing was held on Maryland's motion to use closed-circuit television. *Id.*, at 5. At the hearing, experts gave detailed testimony regarding the trauma each of the four children would suffer if forced to testify in front of defendant at trial. *Ibid.* Craig was present at the hearing, and her counsel cross-examined each expert witness. *Ibid.*

The trial court found that section 9-102's predicate showings had been made regarding each child. *Ibid.* The trial court rejected defendant's Sixth Amendment Confrontation Clause claim. *Ibid.*

The trial commenced on March 16, 1987. *Id.*, at 9. Each child testified under the same procedure. Craig and one of her two counsel remained in the courtroom with an Assistant State's Attorney while Craig's other counsel and another State's Attorney were in the judge's chambers with the child witness and a technician. *Ibid.* Craig and defense counsel in the courtroom could communicate privately with her counsel in chambers by telephone. Testimony was broadcast into the courtroom over audio visual monitors. Each child was cross-examined by the defense. *Ibid.*

Each child testified that defendant sexually abused them. *Ibid.* This testimony was corroborated by medical evidence. On April 2, 1987, the jury found defendant guilty on all four counts. *Ibid.* On September 21, 1987, the court sentenced defendant to ten years imprisonment for the various charges. *Id.*, at 11.

The Maryland intermediate appellate court affirmed the judgment. Petition for Writ of Certiorari, Appendix ("App."), at 22a-69a. If found that, given the trauma each child would suffer if brought face-to-face with Craig, the lack of a face-to-

face meeting did not violate the Sixth Amendment. *Id.*, at 56a-58a.

The Court of Appeals of Maryland reversed the convictions. *Craig* v. *State*, 560 A. 2d 1120 (1989). The Maryland court had previously given section 9-102 a narrow construction in *Wildermuth* v. *State*, 530 A. 2d 275 (1987), requiring personal questioning of the child by the judge in most cases. *Id.*, at 289. The court in the present case interpreted *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) to require even further narrowing, *Craig*, 560 A. 2d, at 1125, and added a requirement that the questioning of the child be done *in the defendant's presence*. *Id.*, at 1127. The court reversed the conviction, looking specifically to *Coy* for the showing needed to invoke the statutory procedure. *Id.*, at 1121.

SUMMARY OF ARGUMENT

The actions of the trial court did not violate defendant's right to confrontation under the Confrontation Clause of the Sixth Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment. This Court should adopt the reasoning of the plurality in *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 52 (1987) that the Confrontation Clause does not apply to pretrial procedures.

Requiring the child to testify pretrial to justify televising his testimony would endanger the child protection schemes of many states and force vulnerable children to undergo precisely the harmful experience these procedures are designed to avoid. Currently no other state requires a child to confront defendant before having his trial testimony televised. Adoption of the result reached by the Maryland Court of Appeals would frustrate the states' efforts.

ARGUMENT

I. The Sixth Amendment right to confrontation is a trial right.

"In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him." U. S. Const. amend. VI.

By extending the Confrontation Clause to a pretrial hearing to determine whether a child is entitled to testify over closed-circuit television in a child abuse prosecution, Maryland's Court of Appeals takes the Confrontation Clause beyond the boundaries of precedent and common sense. The Confrontation Clause is a trial right, and should only be applied to proceedings at trial. As the section 9-102[2] hearing was not part of defendant's trial, she had no federal constitutional right to confront the children at that hearing. Any other result would warp the Confrontation Clause and prevent Maryland and other states[3] from accomplishing the goal of protecting abused children from our legal system.

A. Ritchie and Its Precedents.

The Confrontation Clause has a long and well-litigated history before this Court. One constant throughout this history is that the clause is essentialiy a *trial* right.

The plurality opinion in *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987) provides the most direct statement that the Confrontation Clause is limited to the trial. Ritchie was charged with rape, involuntary deviate sexual intercourse, incest and

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2. Md. Cts. & Jud. Proc. Code Ann. § 9-102.

3. See *infra*, part II, at 19-25.

corruption of a minor. *Id.*, at 43. During pretrial discovery, Ritchie served a subpoena on Children and Youth Services (CYS), a state agency in charge of investigating child mistreatment and neglect cases. The subpoena sought access to CYS records concerning the victim, Ritchie's thirteen-year-old daughter. *Ibid.* CYS refused to comply with the subpoena, claiming that the records were privileged. *Ibid.* Ritchie moved to sanction the CYS and the trial court denied the motion, refusing to order the CYS to disclose the files. *Id.*, at 44.

Ritchie claimed "that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial." *Id.*, at 52. The Pennsylvania Supreme Court accepted Ritchie's claim, interpreting *Davis* v. *Alaska*, 415 U. S. 308 (1974) as holding that a privilege cannot be used to prevent defendant from obtaining information before the trial that might help defendant impeach or cross-examine a witness. *Ritchie*, *supra*, 480 U. S., at 52.

This Court reversed. A plurality[4] rejected the Pennsylvania Supreme Court's interpretation of *Davis*.

> "If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Ibid.* (emphasis in original).

4. Three justices disagreed with the plurality on whether the Confrontation Clause applied before the trial. *Id.*, at 61 (Blackmun, J., concurring in the judgment); *id.*, at 66 (Brennan, J., dissenting, joined by Marshall, J.). Two other justices did not address the Confrontation Clause issue, dissenting on the ground that the case should not have been before the court because it lacked finality. *Id.*, at 75 (Stevens, J., dissenting, joined by Brennan, Marshall, and Scalia, JJ.).

The Confrontation Clause protects two interests of criminal defendants, "the right physically to face those who testify against him, and the right to conduct cross-examination." *Id.*, at 51. The plurality recognized that "[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Id.*, at 53.

The cross-examination protected by the Confrontation Clause is the cross-examination conducted by defendant at trial. While *Ritchie* did not concern a defendant's right to confront witnesses in a pre-trial hearing, the plurality clearly implies there is no such right. "The right of confrontation is exclusively a 'trial right' . . . . It does not . . . require the government to produce witnesses whose statements are not used at trial, or to produce the underlying information on which its witnesses base their testimony." *Ritchie*, 480 U. S., at 54, n. 10, quoting Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 125-126 (1974). As the Confrontation Clause is only concerned with protecting the cross-examination of witnesses who testify at trial, the right to confrontation cannot extend to any pre-trial proceeding. See *Ritchie*, 480 U. S., at 53, n. 9.

The *Ritchie* plurality's view is supported by this Court's previous treatment of the Confrontation Clause. One of the earliest statements of the reasons behind the Confrontation Clause is found in *Mattox* v. *United States*, 156 U. S. 237 (1895). *Mattox* dealt with the question of whether the transcript of first-trial testimony of since-deceased witnesses was admissible at retrial. *Id.*, at 238. The Court rejected defendant's claim that admitting this testimony violated the Confrontation Clause. The *Mattox* court found that:

> "[t]he primary object of the constitutional provision in question [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.*, at 242-243.

These protections which the Confrontation Clause affords defendant are exclusively the province of the trial. An affidavit or deposition can only be admitted against a criminal defendant to prove guilt if it is introduced at trial. The prosecution witness can only "stand face to face with the jury in order that they may look at him" at trial.

The principles of *Mattox* were reaffirmed in *Dowdell* v. *United States*, 221 U. S. 325 (1911). The *Dowdell* court analyzed the right to confrontation in the Philippine Bill of Rights, which was substantially the same as the Sixth Amendment's Confrontation Clause. *Id.*, at 329-330. In construing this provision, the court noted that:

> "[t]his provision . . . intends to secure to the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused the opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte*, affidavits and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross-examination." *Id.*, at 330 (citing *Mattox*, 156 U. S., at 242).

Once again, this Court sees the right to confrontation as preventing improper activities from occurring at trial. As long

as the procedure does not involve taking testimony against the defendant, the Confrontation Clause cannot be invoked. Thus the *Dowdell* court ruled that the Philippine Supreme Court could take certificates from the trial judge, clerk and court reporter for the purpose of correcting the appellate record without violating the defendants' confrontation rights. Since no "additional testimony was taken against the accused . . . bearing upon their guilt or innocence" when the Philippine Supreme Court obtained the certificates, defendants' right to confrontation was unharmed. *Id.*, at 331-332.

More recent decisions also contain extensive analysis of the purpose and limits of the Confrontation Clause. The Confrontation Clause's basis in the trial can be seen in the greatly reduced importance this Court has placed on pretrial confrontation. In *Barber* v. *Page*, 390 U. S. 719 (1968) the primary evidence against defendant was the reading of the transcript of the preliminary hearing testimony of a witness who was incarcerated at a federal prison in another state at the time of the trial. *Id.*, at 720. The defendant did not cross-examine the witness at the preliminary hearing. The *Barber* court found that Barber's right to confrontation was violated as no showing of unavailability had been made. *Id.*, at 724-725. The court also noted that even if defendant had cross-examined the witness at the preliminary hearing, the Confrontation Clause still would be violated.

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. *Id.*, at 725.

This functional interpretation of what is required to satisfy the Confrontation Clause is equally applicable to the reach of

the Confrontation Clause. *Barber* holds that the Confrontation Clause is not satisfied by pretrial confrontation because defendant's interests in a pretrial hearing are less than his interests at trial. This difference of interests also justifies not applying the Confrontation Clause to the less important pretrial hearings.

The basis of the Confrontation Clause in the trial was shown when it was first applied to the states. The Confrontation Clause was made obligatory upon the states through the Fourteenth Amendment's Due Process Clause in *Pointer* v. *Texas*, 380 U. S. 400 (1965). Writing for the majority, Justice Black noted that in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) the Sixth Amendment's right to counsel applied to the states on the ground that the right to counsel is fundamental to a fair trial. *Pointer*, 380 U. S., at 403. Justice Black then noted that in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) the court had applied the Fifth Amendment's guarantee against self-incrimination to the states because it too was fundamental to a fair trial. *Ibid.* Justice Black then proceeded to apply the Confrontation Clause to the states, finding that it, like the right to counsel and the guarantee against self-incrimination, is fundamental to a fair trial. *Ibid.*

> "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. *Id.*, at 404.

Thus when the *Pointer* court affirms that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal," *id.*, at 405, this simply reaffirms the roots of the Confrontation Clause in the trial.

California v. *Green*, 399 U. S. 149 (1970) dealt with the relationship between the Confrontation Clause and exceptions

to the rule against hearsay. *Id.*, at 155. In deciding that it was constitutionally permissible to admit prior inconsistent statements as substantive evidence, *id.*, at 154-155, this Court looked to the reasons behind the right to confrontation. The core of the Confrontation Clause was the "literal right to 'confront' the witness at the time of trial." *Id.*, at 157. Quoting extensively from *Mattox* v. *United States*,[5] the court determined that the Confrontation Clause was designed to prevent the defendant from being convicted by depositions and affidavits, giving defendant the right to confront and cross-examine adverse witnesses at trial. *Green*, 399 U. S., at 157-158.

The *Green* court took a practical view of the Confrontation Clause.

> "This conclusion [that the Confrontation Clause was not violated] is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Id.*, at 158 (footnote omitted) (quoting 5 Wigmore § 1367).

These concerns deal with insuring the reliability of the trial. While these purposes would help any fact-finding proceeding, they refer to, and are intimately concerned with the most important fact-finding process in the criminal justice system — the trial.

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5. See *supra*, at 8.

The *Green* court was concerned with the historical purpose behind the right to confrontation — preventing conviction based upon depositions. Thus defendant is entitled to cross-examine and literally confront his accusers, but he is only entitled to do so at trial. As the trial is the only place defendant can be convicted of a crime, defendant has no constitutional right of confrontation outside the trial.

The last case in the line leading to *Ritchie* is *Ohio* v. *Roberts*, 448 U. S. 56 (1980). *Roberts* dealt with the introduction of the preliminary hearing testimony of a witness who did not testify at defendant's subsequent trial. *Id.*, at 58-59. The analysis of the relationship between the hearsay rule and the Confrontation Clause naturally delved into the purpose behind the Confrontation Clause, and once again identified its roots in the trial. "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation *at trial*." *Id.*, at 63 (italics added).

The *Roberts* court adopted the view of *Mattox* v. *United States*, 156 U. S. 237 (1895), that the Confrontation Clause was primarily concerned with providing the accused with the ability to test the witnesses against him in front of the jury. *Roberts*, 448 U. S., at 63-64. In commenting on how confrontation helped defendant cross-examine witnesses, the *Roberts* court noted that "[t]hese means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.' " *Id.*, at 64, quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973) (additional quotation marks omitted).

This passage in *Roberts* provides the ultimate justification for the Confrontation Clause. Having the defendant confront his accusers at trial helps ensure that the truth will come out at trial. The right to confrontation enhances the truth-seeking function three ways: by cross-examination, by forcing the witness to make his accusations to the defendant's face and by

requiring the witness to testify under oath. *Roberts*, 448 U. S., at 63, n. 6.

> "On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown — and hence unchallengeable — individuals.
>
> "But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee* v. *Illinois*, 476 U. S. 530, 540 (1986).

The actions of the trial court in the present case do not threaten the interests protected by the Confrontation Clause. The victims did not testify at a hearing held to determine the propriety of televising their trial testimony over closed-circuit television. That hearing did not present any evidence to the fact-finder regarding the ultimate question of guilt or innocence. The section 9-102 hearing was held only to determine whether there was sufficient justification to use a particular means of presenting evidence.

While defendant's interests were adversely affected by the result of the section 9-102 hearing, adverse affect alone is not enough to invoke the Confrontation Clause. The hearing neither caused defendant to be subject to criminal sanction nor lessened the state's burden of proving its case. After the hearing, the state still had to go to trial, it still had to produce evidence and it still had to convince the jury beyond a reasonable doubt that defendant committed the charged crimes.

All the hearing accomplished was to allow the state to present the children's testimony at defendant's trial in a manner that prevented the child witness from seeing defendants when they testified. While this had some effect on defendant's ability to confront the children at trial, this is not enough to impose the Confrontation Clause on this pretrial hearing.

There are many instances where pretrial proceedings will be very important to the outcome of a criminal case. This Court, however, has declined to impose the Confrontation Clause on such proceedings. Thus in *Gerstein* v. *Pugh* 420 U. S. 103 (1975) this Court held that while the Fourth Amendment entitled a person to a judicial determination of probable cause for pretrial restraint of liberty, defendant was not entitled to confront and cross-examine witnesses at the hearing. *Id.*, at 120. This Court has also found no violation of the Confrontation Clause when an informant did not testify at a suppression hearing and the arresting officers refused to divulge the name of the informant. *McCray* v. *Illinois*, 386 U. S. 300, 312-313 (1967). Federal Rules of Criminal Procedure rule 5.1(a) freely allows the use of hearsay evidence in preliminary examinations despite the fact that as the Confrontation Clause generally forbids the use of hearsay at trial without some showing of the reliability of the testimony and the unavailability of the declarant. See *Roberts*, *supra*, 448 U. S., at 66. Finally, there is no right of confrontation at all in grand jury proceedings. See *Hannah* v. *Larche*, 363 U. S. 420, 449 (1960).

Determining whether a child can testify over closed-circuit television is no more important to defendant than determining probable cause under the Fourth Amendment for pretrial restraint of liberty, determining whether a piece of evidence is constitutionally admissible at trial or determining whether there is sufficient evidence to justify prosecution. The Confrontation Clause therefore is no more applicable to this hearing than it is to these other procedures.

B. Recent Cases.

In the last three years, this Court has decided two important cases on the relationship between procedures designed to protect the testifying victim in child abuse cases and the Confrontation Clause. These cases, *Kentucky* v. *Stincer*, 482 U. S. 730 (1987) and *Coy* v. *Iowa*, 487 U. S. ___, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988), follow the line of reasoning started in *Mattox* v. *United States*, 156 U. S. 237 (1895) and continuing through *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987) that the scope of Confrontation Clause is limited to the trial.

In *Stincer* defendant was excluded from a hearing to determine the competency of two child witnesses. Stincer claimed this violated his right to confrontation and due process. *Stincer*, 482 U. S., at 732. Stincer had been indicted for committing first-degree sodomy with an eight-year-old girl, a seven-year-old girl and a five-year-old boy. *Ibid.* After the jury was sworn, but before the evidence was presented, the trial court conducted a hearing in chambers to determine if the children were competent to testify. *Ibid.* Over defendant's objection, defendant was excluded from this hearing although his counsel did attend. *Id.*, at 732-733. The trial court found both children competent to testify. *Id.*, at 733. Each child testified at trial and defendant was convicted of first-degree sodomy. *Id.*, at 733. The Kentucky Supreme Court reversed Stincer's conviction, finding that his right to confrontation was violated when he was prevented from attending the competency hearing. *Id.*, at 734. This Court granted certiorari to examine the constitutionality of the trial court's actions.

This Court once again examined the purpose behind the Confrontation Clause. The *Stincer* court noted that cross-examination was a primary interest served by the Confrontation Clause, and that cross-examination "is critical for ensuring the integrity of the factfinding process." *Id.*, at 736. The court, quoting from *Mattox* v. *United States*, 156 U. S. 237

(1895)[6] recognized that the chief value of cross-examination was giving defendant a chance to test the prosecution's case in open court, thus preventing conviction by deposition or affidavit. *Stincer*, 482 U. S., at 736-737. Therefore "the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial." *Id.*, at 739.

The *Stincer* court found defendant's right to confrontation had not been violated. It found that in Kentucky, as in some other states, witness competency is not a jury question, but is the sole province of the judge. *Id.*, at 742. Furthermore, defendant had the opportunity to conduct a thorough cross-examination of the two children at trial. *Id.*, at 744. Therefore defendant had sufficient opportunity to confront the children. *Ibid.*

Stincer did not involve pretrial use of the Confrontation Clause. The competency hearing took place after the jury was sworn, *id.*, at 732, and the Kentucky Supreme Court felt that the hearing was a crucial part of Stincer's trial. *Id.*, at 744, n. 17. Thus this Court chose not to distinguish between trial and pretrial proceedings because in Kentucky the competency hearing could be a stage of the trial. *Id.*, at 739. Therefore *Stincer* does not contradict the view of the *Ritchie* plurality that there is no right to pretrial confrontation. *Id.*, at 738-739, n. 9.[7]

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6. See *supra*, at 8.

7. Justice Blackmun, the author of the *Stincer* opinion, disagreed with the *Ritchie* plurality's view that the Confrontation Clause did not apply before the trial. *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 62 (1987) (Blackmun, J., concurring). This difference between Justice Blackmun and the *Ritchie* plurality, however, had no bearing on the case in *Stincer*. *Stincer*, 482 U. S., at 738, n. 9.

The reasoning behind *Stincer* supports limiting the Confrontation Clause to the presentation of evidence to the fact-finder at trial. The *Stincer* court envisioned a "functional" Confrontation Clause that is primarily concerned with defendant's ability to cross-examine witnesses at trial. *Id.*, at 737. The court wanted to keep the fact-finding process as reliable as possible and prevent defendants from being convicted on untested depositions or ex parte affidavits. *Id.*, at 736. These are the same interests and concerns raised by this Court in Confrontation Clause cases time and again, from *Mattox* to *Ritchie*.[8] Therefore *Stincer* is best seen as a continuation of the line of reasoning that ultimately supports limiting the scope of the Confrontation Clause to the trial.[9]

The most recent major case dealing with the Confrontation Clause was *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). *Coy*, like *Stincer* and *Ritchie* before it, also involved the testimony of the complaining witness in a child molestation prosecution. In *Coy*, defendant "was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight." 108 S. Ct., at 2799, 101 L. Ed. 2d, at 862.

The *Coy* court reversed the conviction on Confrontation Clause grounds. The *Coy* court found that while most Confrontation Clause cases were concerned with the admissibility of out-of-court statements or restrictions on the scope of cross-examination, 108 S. Ct., at 2800, 101 L. Ed. 2d, at 863-864, the Confrontation Clause also guaranteed defendant the

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8. See part I A, *supra*, at 5-15.

9. *Stincer* also addressed the due process right to be present. *Id.*, at 743-747. This issue is not raised in the present case as Craig was present throughout the pretrial hearing. See App., at 5.

right to "a face-to-face meeting with witnesses appearing before the trier of fact." 108 S. Ct., at 2800, 101 L. Ed. 2d, at 863-864. As there was no face-to-face encounter, and, as no specific finding had been made that the children needed protection, the Confrontation Clause was violated and Coy's conviction was reversed. 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867.

Coy continued this Court's tradition of tying the Confrontation Clause to the trial. The *Coy* court realized that the primary concern behind the Confrontation Clause was preserving the integrity of the fact-finding process. 108 S. Ct., at 2802, 101 L. Ed. 2d, at 866. The *Coy* court saw "the face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' " 108 S. Ct., at 2801, 101 L. Ed. 2d, at 865 quoting *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965). Thus, as in previous cases, the right to confrontation in *Coy* is used to prevent unjust convictions. The proper place to check unfounded convictions is in the trial. The *Coy* court seemed to recognize this when it emphasized a particular part of a passage from *California* v. *Green*.

> "To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.' " 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867, quoting *California* v. *Green*, 399 U. S. 149, 175 (1970) (Harlan, J., concurring) (emphasis added in *Coy*).

To the *Coy* court the "irreducible literal meaning" of the Confrontation Clause limited the scope of the right to confrontation to the trial. As *Coy* dealt with the interference of defendant's right to confront witnesses at trial, there was no need to make any distinction between trial and pretrial rights to confrontation. That the *Coy* court nonetheless indicated

that the literal right to confront was applied only to the trial demonstrates that the *Coy* court was aware of and agreed with the line of cases leading to the *Ritchie* plurality's finding that the Confrontation Clause did not extend to pretrial procedures.

The *Coy* majority explicitly reserved for another case whether "individualized findings" would support an exception to literal confrontation during the child's testimony. 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867. The concurrence explicitly stated that a "case-specific finding of necessity" might provide the "compelling state interest" that would make "the strictures of the Confrontation Clause . . . give way." *Id.*, at 2805, 101 L. Ed. 2d, at 869-870 (O'Connor, J., concurring). The dissenting justices did not believe that a "case-by-case inquiry" was needed. *Id.*, at 2809, 101 L. Ed. 2d, at 875 (Blackmun, J., dissenting).

In none of the opinions in *Coy*, however, is there a hint of the second-order confrontation right found by the state court in the present case. There is no right to confront the witness at a hearing for the purpose of determining whether an exception exists to the usual right to confront the witness.

II. Applying the Confrontation Clause to pretrial hearings will prevent states from protecting abused child witnesses.

A. The Child's Ordeal.

In her concurring opinion in *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), Justice O'Connor, joined by Justice White, noted that a defendant's confrontation "rights are not absolute" but under certain circumstances, could be modified "so as to permit the use of certain procedural devices designed to shield a child from the trauma of

court-room testimony. " 108 S. Ct., at 2803, 101 L. Ed. 2d, at 868 (O'Connor, J., concurring). The concurrence recognized that child abuse is one of the greatest problems faced by society, and that the problems of the abused child may continue after the prosecution of the abuser commences. *Id.*, at 2803-2804, 101 L. Ed. 2d, at 868.

Many states recognize that prosecuting child abuse cases can harm the child and have enacted "a variety of ameliorative measures to help the child through the prosecution." *Coy, supra*, *Id.*, at 2804, 101 L. Ed. 2d, at 868 (O'Connor, J., concurring). Applying the Confrontation Clause to pretrial procedures would prevent the states from helping the children. If defendants have a pretrial right to confrontation, then the states will not be able to protect the abused child from certain harms without first subjecting the child to the harm the states seek to avoid.

Such an interpretation of the Confrontation Clause would be tragic for the child. The court would put the child on the stand, have him confronted and cross-examined by defendant and defense counsel. If the child holds up under the strain of confronting defendant, the child would not be entitled to having his trial televised. On the other hand, if the child is sufficiently hurt by his encounter with defendant then the child can receive the protection of televised testimony. Therefore in order to save the child you would first have to destroy him.[10]

Given the unpleasant options left to the child by the Maryland Court of Appeals, it is likely that the child would want to avoid using section 9-102. If he uses section 9-102 he is guaranteed at least one harrowing confrontation with defendant,

10. "It became necessary to destroy this town in order to save it." Attributed to an American officer firing on Ben Tre, Vietnam in the Vietnam War. J. Bartlett, Familiar Quotations 925 (15th ed. 1980).

or if the court feels that the child's experience was not painful enough, then the child would be forced to confront defendant *twice*, once at the pretrial hearing and again at trial. With these alternatives the sensible course would be to avoid using section 9-102, guaranteeing that child meets the defendant at trial but avoiding the risk of meeting defendant twice.

Requiring the child to be harmed by confronting defendant before taking steps to prevent such harm is similar to an archaic method of proof known as the water-ordeal.

> "Water-ordeal was performed either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water: and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practiced in many countries to discover witches, *by casting them into a pool of water, and drowning them to prove their innocence*." 4 W. Blackstone, *Commentaries* 337 (1769) (emphasis added).

Requiring the child to confront defendant before the trial is more accurate than the water-ordeal. To the child, however, the treatment must seem very similar. If no harm comes to him he is "guilty" and gets no relief; only if he suffers enough is the child "innocent" and entitled to relief.

This painful method of proof should not be enshrined into a Constitutional right. In the present case, extensive expert testimony was taken regarding the children's inability to confront defendant under normal trial conditions.[11] Defendant was present during the expert testimony and defense counsel

11. See *supra*, at 3.

was allowed to cross-examine these experts. Pet., at 5. The trial court found that the predicate showing of need had been made as to each child. Pet., at 8-9.

The expert testimony was more than sufficient to sustain the trial court's "individualized findings that these particular witnesses need special protection." *Coy*, *supra*, 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867. States should be allowed to develop their own standards of proving need to satisfy *Coy*. "The circumstances of this case demonstrate again that neither the Constitution as originally drafted nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." *California* v. *Green*, 399 U. S. 149, 171-172 (1970) (Burger, C. J., concurring).

The Confrontation Clause was meant to give defendant a chance to test the evidence used against him at trial. It was meant to prevent conviction by deposition like Sir Walter Raleigh's treason conviction.[12] The right to confrontation was not meant to turn every aspect of the criminal process into a mini-trial.

B. Other States.

The harm done by affirming the Maryland court's decision would not be limited to the state of Maryland. Many states have enacted statutes providing for televising the testimony of

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12. Sir Walter Raleigh was accused of treason by conspiring with Lord Cobham to make Arabella Stuart Queen of England. The case against Raleigh consisted of a confession of Cobham extracted by torture. Cobham subsequently repudiated his confession in a letter to Raleigh. At trial Raleigh demanded that Cobham be brought before him for questioning. The court refused as it realized that the confession would be repudiated. Raleigh was convicted and executed fifteen years later. Pollit, *The Right of Confrontation: Its History and Modern Dress* 8 J. Pub. L. 381, 388-389 (1959).

abused children.[13] Requiring the child to personally confront defendant at a pretrial hearing before letting the child testify over television prevents these statutes from accomplishing their goal of helping the child.

The state of New York recognizes that the child should not be forced to confront defendant at the pretrial hearing. New York provides for televising a child's testimony over closed-circuit television in section 65.30 of New York's Criminal Procedure Law. Section 65.20 of the Criminal Procedure Law prescribes the procedure for application and the grounds for determining whether a child's testimony should be televised. Subdivision 6 of section 65.20 states that "[n]otwithstanding any other provision of law, the child witness who is alleged to be vulnerable may not be compelled to testify at such hearing [held to determine whether the child's testimony should be televised] or submit to any psychological or psychiatric examination. The failure of the child witness to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section."

California takes an approach similar to New York's. California Penal Code section 1347(b) allows the child witness to testify over two-way .elevision if the trial court makes certain findings showing that the witness is otherwise unavailable and the equipment accurately conveys the image and demeanor of the witness. Subdivision (c)(2) provides that the child may not be compelled to testify at the hearing to determine whether to televise the child's testimony. Evidence Code section 240(c) provides that witnesses unavailability can be proven by expert testimony showing that the physical or mental trauma of the crime makes the victim incapable of testifying. Thus Evidence Code Section 240(c) permits the trial court to make its find-

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13. Twenty-six states have enacted such statutes. See Brief Amicus Curiae for National Association of Counsel for Children Appendix A 1a-2a.

ings under Penal Code section 1347 based solely on expert testimony. However, California does allow the trial court the discretion to question the child in chambers. Cal. Pen. Code § 1347(c)(3) (Deering 1990 Supp.). This questioning can only be done by the judge and must be done in chambers; defendant cannot be present during the questioning. The Maryland decision, if accepted by this Court, would throw a wrench into this carefully balanced procedure.

Indiana is another state whose procedure is threatened by the decision of the Maryland court. Section 35-37-4-8 of the Indiana Code allows the trial court to order that an abused child testify over closed-circuit television. The court cannot make this order without some justification. The justification can consist of a psychiatrist's certification "that the child's testifying in the courtroom would be a traumatic experience for the child," or a physician certifying "that the child cannot be present in the courtroom for medical reasons" or the introduction of evidence that allows the court to find "that it is more likely than not that the child's testifying in the courtroom would be a traumatic experience for the child." Ind. Code Ann. § 35-37-4-8(d)(1)(c)(i-iii) (West 1986). Indiana has provided a way to make the individualized finding of need required by the *Coy* court[14] without forcing the child to unnecessarily confront defendant. As either medical or psychiatric testimony can be sufficient to prove a child's need to have his trial testimony televised, the child does not necessarily have to testify to prove his need.

Mississippi has a statutory plan similar to Indiana's. Mississippi, like Indiana, provides the means for a trial court to determine that the child needs to have his trial testimony televised without forcing the child to testify at the pretrial hearing.

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14. See *supra*, at 19.

The trial court can order an abused child's testimony be televised if it makes a finding that, based upon certain behavioral indicators, "that there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court." Miss. Code Ann. § 13-1-405(1) (1989 Supp). Mississippi allows these behavioral indicators to be proven by child psychologists and child psychiatrists. *Id.*, § 13-1-411.

Other states are not as explicit in their desire to insulate the child from having to testify in any hearing regarding the televising of the child's trial testimony. While some states require courts to make certain findings[15] before allowing the child's trial testimony to be televised, many states have no standards. No statute, anywhere in the nation, requires the child to testify to prove his need to have his testimony televised.

The decision of Maryland's highest court, if accepted by this Court, would destroy the policy these states have set forth. They will no longer be able to insulate the child from the many harms of testifying. The very process they use to allow the testimony to be televised under *Coy* will be used to undermine the policy of minimizing the contacts between the abused child and his alleged abuser.

III. Two-way television raises no confrontation problem.

The Maryland Court of Appeal indicated that the trial court on remand should consider two-way television. *Craig* v. *State*, 560 A. 2d 1120, 1128 (1989). If retrial is necessary for

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15. See, *e.g.*, Alaska Stat. § 12.45.046(c) (1989 Supp.); Fla. Stat. Ann. § 92.54 (1), (West 1990 Supp.); Ohio Rev. Code Ann. § 2907.41(E) (Page 1987); N. J. Rev. Stat. § 2A:84A-32.4(b) (West 1990 Supp.).

any reason, see *id.*, at 1121, n. 3, this Court should clarify for guidance on retrial that two-way television raises no federal Confrontation Clause problem whatever. See *Coy* v. *Iowa*, 108 S. Ct. 2798, 2804, 101 L. Ed. 2d 857, 868 (1988) (O'Connor, J., concurring). The *Coy* court was concerned with the defendant's and the witness's inability to see each other. *Id.*, at 2802, 101 L. Ed. 2d, at 866. Two-way closed-circuit television, however, lets the witness "[l]ook [defendant] in the eye and say that." *Id.*, at 2801, 101 L. Ed. 2d, at 865. Thus a court would not need to make an individualized finding that a child needed protection to order televising a child's testimony over two-way closed-circuit television.

Several states only allow two-way closed-circuit television in the televised testimony statutes.[16] Other states do not differentiate between two-way and one-way closed-circuit television.[17] These and other states need assurance that the use of two-way closed-circuit television can be done without raising any Confrontation Clause issues.

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16. See Cal. Penal Code § 1347(b) (Deering 1990 Supp.); Haw. Rev. Stat. § 626-1:Rule 616(d) (1985); Vt. R. Evid. 807(e) & (f) (1989 Supp.).

17. See, *e.g.*, Ind. Code Ann. § 35-37-4-8(b)(1) (West 1986); Miss. Code. Ann. § 13-1-405(1) (1989 Supp.); N. J. Rev. Stat. § 2A:84A-32.4(a) (West 1990 Supp.).

Conclusion

The decision of Maryland Court of Appeals should be reversed.

Dated: February, 1990

Respectfully submitted,

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No. 89-478

(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

—v.—

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS CURIAE* FOR THE DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK, THE DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK, AND THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits a child victim of sexual abuse to testify and be fully cross-examined outside the defendant's presence via closed-circuit television, after an appropriate case-specific finding has been made that such a procedure will protect the child from suffering serious psychological harm, without first requiring the child to suffer that harm by testifying in the defendant's presence.

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IN THE

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OCTOBER TERM, 1989

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STATE OF MARYLAND,

Petitioner,

—v.—

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

AUTHORITY TO FILE BRIEF AMICUS CURIAE

Charles J. Hynes, District Attorney of Kings County, New York, and Robert T. Johnson, District Attorney of Bronx County, New York, have authority to file the attached brief *amicus curiae* pursuant to Rule 37.5, because each is the authorized law officer of a political subdivision of a state.

Charles J. Hynes and Robert T. Johnson, together with The New York State District Attorneys Association, also file this brief with consent of the attorneys for the petitioner and respondent, pursuant to Rule 37.3. Letters of consent from the attorneys for the parties have been mailed under separate cover to the clerk of this Court.

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BRIEF *AMICUS CURIAE* FOR THE DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK, THE DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK, AND THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*

1. Charles J. Hynes is the District Attorney of Kings County, New York. The District Attorney's Office prosecutes sex crime cases in Kings County, including those involving child victims. Over the years this office has prosecuted thousands of such cases. The office has also had to decline to prosecute a significant number of such cases because the child victims in those cases were unable to endure the psychological trauma caused by testifying using traditional testimonial procedures.

To address this problem, the Kings County District Attorney's Office, together with the New York State Attorney General's Office, drafted legislation to enable child sex crime victims in New York State to testify at trial via two-way closed-circuit television. This legislation was enacted in 1985 as Chapter 505 of the Laws of 1985 and became Article 65 of the New York Criminal Procedure Law, appended to this brief. The law was originally passed as a three-year experiment. In 1988, the law was extended for an additional three-year period. According to statistics compiled by the Chief Administrative Judge of the Courts of New York, the procedures authorized by this law have been used approximately thirty times since its enactment. *1987-1989 Reports to the Governor, the Chief Judge, and the Legislature of the State of New York Pursuant to New York Judiciary Law Section 216 (4) Concerning the Use of Closed-Circuit Television for Vulnerable Child Witness's Testimony*. The constitutionality of that law was recently upheld by the New York State Court of Appeals in *People v. Cintron*, No. 241 (N.Y. Ct. App. January 11, 1990) (available on Westlaw, 1990 W.L. 1337).

Because of the inherent difficulties in prosecuting child abusers, and the rising number of child sex abuse cases, *amicus* has a strong interest in using modern technology to minimize the trauma that child victims experience during trial testimony. By sparing children a "second victimization" in the courtroom, the criminal justice system can encourage such victims to report crimes committed against them, and prosecutors can obtain their testimony for trial and can proceed with warranted criminal prosecutions against child molesters.

2. Robert T. Johnson is the District Attorney of Bronx County. The Bronx County District Attorney's Office prosecutes child sex crimes which occur in Bronx County and has also had to decline prosecutions of child sex crimes because some child victims were too traumatized to testify at trial using traditional testimonial procedures. Since the enactment of New York Criminal Procedure Law Article 65, *amicus* has proceeded pursuant to that statute on a number of occasions

and has found it to be an effective means of sparing the child victim from serious psychological harm.

The Bronx County District Attorney recently successfully defended the constitutionality of New York's closed-circuit television statute in the New York State Court of Appeals. *See People v. Cintron*, *supra*. Like his counterpart in Kings County, the Bronx County District Attorney has a strong interest in seeing the constitutionality of closed-circuit television procedures upheld so that sex offenders who prey on young children can be brought to justice.

3. The New York State District Attorneys Association is a voluntary organization representing local prosecutors from each of the 62 counties in New York State. The prosecutors in each of these counties prosecute child sex offenses occurring within their jurisdiction. Since its founding in 1948, the Association's programs of education, training, legislative reform and *amicus curiae* activity further one of its chief goals, that of improving the functioning of the criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the problems that are inherent in child molestation cases, a number of states have adopted statutes that permit the use of testimony via two-way closed-circuit television in lieu of traditional in-court testimony. These two-way systems fundamentally differ from the system in *Coy* and in the case at bar. They permit the testifying witness and defendant to hear and view one another, thereby satisfying the letter and spirit of the Confrontation Clause. In *Coy*, Justice O'Connor suggested that these two-way systems "may raise no substantial Confrontation Clause problem." *Coy v. Iowa*, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring). Justice O'Connor was correct. These systems do not implicate, much less offend, the Confrontation Clause. Unfortunately, the courts of several states have considered these systems to be equivalent, for Confrontation Clause purposes, to the one-way screen employed in *Coy*, and, consequently, have incorrectly ruled that the Constitution

mandates a hearing as a condition precedent to the use of two-way systems that simultaneously transmit a child's testimony to the courtroom. This Court should use the opportunity presented by this case to make it clear that two-way closed-circuit television systems are a constitutional alternative to traditional in-court testimony in child sexual abuse cases.

Should this Court determine that the Confrontation Clause is implicated whenever a child testifies via closed-circuit television about alleged sexual abuse, the state's compelling interest in protecting child witnesses outweighs the need for strict compliance with the Confrontation Clause. This is so whether the closed-circuit television is a one-way system such as the one at issue here or a two-way system as is used in New York. Indeed, because the latter system implicates the Confrontation Clause only marginally, the state's overriding need for this alternative to traditional in-court testimony in these cases is even more clearly established. As this Court recognized in *Coy*, "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Coy v. Iowa*, 108 S. Ct. at 2802. *See Ohio v. Roberts*, 448 U.S. 63, 64 (1980) ("competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 [1973]). Because the use of closed-circuit television is often the only way to elicit a child's testimony and attempt a successful prosecution of the child's alleged abuser, without severe harm to the child, there is a compelling need for an exception to strict compliance with the Confrontation Clause to allow such evidence at a state trial.

Strict compliance with the Confrontation Clause is not required if the two-part test established in *Ohio v. Roberts*, 448 U.S. at 65-66, is satisfied. *See, e.g., Nelson v. Farrey*, 874 F.2d 1222, 1230-34 (7th Cir. 1989) (Flaum, J., concurring), *U.S. app. pending* (applying *Ohio v. Roberts* test to case concerning admission of psychologist's testimony about statements made by four-year-old victim of first-degree sexual assault in Wisconsin). First, there must be a case-specific finding of a need for the particular statements of a witness,

where admission of the statements does not provide the defendant with face-to-face confrontation regarding that evidence. *Ohio v. Roberts*, 448 U.S. at 65. Second, there must be indications that the evidence sought to be admitted is reliable. *Id.* at 65-66. Where the prosecution seeks to allow a victim of child abuse to testify via closed-circuit television, either a need to protect the child from suffering harm or a need for the child's testimony should satisfy the necessity requirement. While the child's testimony in and of itself may not necessarily bear indications of inherent reliability (as is the case with dying declarations or excited utterances, for example), so long as the procedure employed to gain the child's testimony allows the fact-finder a sufficient opportunity to assess the reliability of the testimony, the reliability requirement is satisfied. Therefore, when these requirements are met in a particular case, this Court should allow the state prosecutor to use closed-circuit television, which is simultaneously transmitted to the courtroom where the trial is being conducted, to present the child's testimony.

Moreover, the Confrontation Clause does not dictate the exact manner by which such a case-specific finding may be made. And, even if it did, this Court should find that the Constitution does not require a child to testify in the presence of the defendant as a condition to the admission of testimony via closed-circuit television. Indeed, any such requirement would lead to absurd results. For example, in New York, the statute regarding testimony via two-way closed-circuit television designates as a prerequisite for the use of such a procedure a finding that the child witness is likely to suffer "severe mental or emotional harm" if required to testify in open court in front of the defendant (N.Y. Crim. Proc. Law § 65.10 [1] [McKinney Supp. 1990]). It would make no sense, and indeed would be intolerable, if the state were allowed to use the child protective measures of a closed-circuit television statute only after the abused child was compelled to testify in the defendant's presence and thereby suffer the very harm the statute seeks to prevent. The Confrontation Clause surely cannot require such an absurd result.

The Court of Appeals of Maryland, however, apparently believed, erroneously, that the Confrontation Clause does require such an intolerable procedure before a child abuse victim could be permitted to testify via closed-circuit television. Therefore, this case should be remanded to that court to determine whether it would find this procedure unnecessary in light of the fact that the Confrontation Clause does not require it.

ARGUMENT

ALLOWING A CHILD VICTIM OF SEXUAL ABUSE TO TESTIFY VIA TWO-WAY CLOSED-CIRCUIT TELEVISION DOES NOT IMPLICATE THE CONFRONTATION CLAUSE. IN ANY EVENT, THE CONSTITUTION DOES NOT REQUIRE, AS A CONDITION PRECEDENT TO THE ADMISSION OF AN ABUSED CHILD'S TESTIMONY VIA CLOSED-CIRCUIT TELEVISION, THAT THE CHILD TESTIFY AT A PRETRIAL HEARING IN THE DEFENDANT'S PRESENCE, IF SUCH A PROCEDURE WILL CAUSE THE CHILD TO SUFFER SEVERE EMOTIONAL HARM.

A. Testimony via two-way closed-circuit television does not implicate the Confrontation Clause.

Initially, *amicus* asks the Court to be mindful of the fact that New York and a number of other states employ a system of two-way closed-circuit television that is fundamentally different from the method being considered in the case at bar.[1] These systems are unique in that they afford the testifying witness and the defendant the opportunity simultaneously to hear and view one another and, consequently, fully protect a defendant's right to confrontation. Accordingly, it is unnec-

1 *See, e.g.*, Cal. Penal Code § 1347 (West Supp. 1989); Haw. R. Evid. 616 (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989 Repl. Vol.); Minn. Stat. Ann. § 595.02 (4) (c) (2) (West Supp. 1989); N.Y. Crim. Proc. Law Art. 65 (McKinney Supp. 1990); Vt. R. Evid. 807 (1989); Va. Code § 18.2-67.9 (1989).

essary for a trial court to make the individualized factual findings of an important state interest normally required when there is a substantive abridgement of a defendant's right to face-to-face confrontation. Nevertheless, although nothing in this Court's ruling in *Coy* suggests a contrary conclusion, the courts of several states have unfortunately misinterpreted *Coy* as mandating such individual findings of fact prior to the use of two-way closed-circuit television systems.[2] These decisions are wrong, and this Court should now take this opportunity to state unambiguously that two-way closed-circuit television systems do not implicate, much less offend, the Confrontation Clause.

Under New York Criminal Procedure Law Article 65, a trial court may utilize a system of live cameras and monitors once it determines that a child will suffer severe mental or emotional harm if required to testify and numerous other conditions are met.[3] If the system is used, the image and voice of the child, who is placed in a separate testimonial room, are transmitted to a closed-circuit television monitor in the courtroom. N.Y. Crim. Proc. Law § 65.30(1). At the same time, the child witness has the opportunity to observe the defendant and jury on a live, closed-circuit television monitor located in the testimonial room. N.Y. Crim. Proc.

2 *See, e.g., State v. Conklin*, 444 N.W.2d 268, 270-71 (Minn. 1989), *reh'g denied* (October 18, 1989) (Minn. LEXIS 262) (individual findings of fact required before use of two-way television systems); *People v. Cintron*, No. 241 (N.Y. Ct. App. January 11, 1990) (available on Westlaw, 1990 W.L. 1337) (same); *People v. Jones*, 209 Cal. App.3d 89, 257 Cal. Rptr. 342 (Cal. Ct. App., 4th Dist. 1989), *review granted* (June 29, 1989) (two-way closed-circuit television systems are to be treated as exception to Confrontation Clause).

3 Specifically, before permitting testimony via two-way closed-circuit television, the court must make a finding, by clear and convincing evidence, that "it is likely, as a result of extraordinary circumstances, that such child will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm." N.Y. Crim. Proc. Law § 65.10 (1). The full text of the statute, including the numerous factors the court may consider in making this finding, is appended to this brief for the Court's convenience.

Law § 65.30(2). In all other respects, the examination and cross-examination must be conducted as if the child were testifying in the courtroom. N.Y. Crim. Proc. Law § 65.30(7).

The New York Court of Appeals has held that this procedure does not facially offend the Confrontation Clause. However, the Court of Appeals predicated its decision on the limited rationale that "a statute which tolerates some infringement of the witness-jury confrontation right can meet constitutional requirements provided it contains sufficient limitations and safeguards." *People v. Cintron*, slip op. at 12. A number of other state courts have also concluded, based on their misreading of *Coy*, that two-way closed-circuit television systems are equivalent, for confrontation purposes, to the system employed in *Coy*. However, as Justice O'Connor noted in *Coy v. Iowa*, 108 S. Ct. at 2804 (O'Connor, J. concurring), testimony via two-way closed-circuit television systems "may raise no substantial Confrontation Clause problems."

Two-way closed-circuit television systems are significantly different from the system employed in *Coy* and in the case at bar. Essentially, a two-way system transforms the concrete wall separating the courtroom and the testimonial room into a transparent pane of glass. Each individual in the courtroom and testimonial room can see and hear one another. Thus, there is no meaningful difference between testimony taken by this method and traditional in-court testimony. In both cases, the defendant can see the witness, the witness can see the defendant, there is full cross-examination and the jury has the opportunity to observe the witness's live, spontaneous reactions during direct and cross-examinations.

The only difference between testimony via two-way closed-circuit television and traditional in-court testimony is that the former reduces or eliminates the risk that a child will suffer severe emotional harm or be unable to testify as a result of the fear-inducing trauma caused when the child testifies

within feet of the defendant.[4] The reduction or elimination of this trauma does not implicate the Confrontation Clause, because that constitutional provision does not guarantee to a defendant a right to instill fear of physical harm in the witness. Indeed, the fear of physical retribution by the defendant, be it real or imagined, has never been viewed as a component of the truth-instilling role of the Confrontation Clause. *Cf. Reynolds v. United States*, 98 U.S. 145, 158 (1878) (the right to confrontation does not exist when the defendant voluntarily keeps the witness from testifying).

This Court's decision in *Coy* does not suggest a contrary conclusion. In *Coy*, the Court noted that the right to face-to-face confrontation[5] arose from the historic belief that a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Coy v. Iowa*, 108 S. Ct. at 2802 (quoting Z. Chafee, *The Blessings of Liberty*, 35 [1956]). By using the term "human feelings," the Court merely recognized the well-settled principle that the purpose of face-to-face confrontation is to produce "a certain subjective moral effect . . . upon the witness." *Id.* at 2801 n. 2

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4 The physical separation of a child witness from the defendant does not stigmatize a defendant so that his right to a fair trial is compromised. "Reason, principle and common human experience" do not dictate that these procedures necessarily give rise to an unmistakable brand of guilt, creating an unacceptable risk, incurable by cautionary instructions, that the jury will depart from its role as an impartial finder of fact. *Estelle v. Williams*, 425 U.S. 501, 504, *reh'g denied*, 426 U.S. 954 (1976). More than likely, the jury will accept the fact that, in this particular instance, the law, not the actions of the defendant, prompted the use of the testimony via two-way closed-circuit television systems. Indeed, the New York statutory scheme provides that, if at all possible, the prosecutor and defense lawyer should conduct their examination of the child from the courtroom, thereby minimizing the possibility that an adverse inference will be taken. N.Y. Crim. Proc. Law § 65.30 (5).

5 Undoubtedly, the historic use of the term "face-to-face" reflects the fact that it was impossible to envision the technology that now facilitates confrontation of witnesses without a concomitant need to be in the same room. *See* Note, *The Testimony of Chiid Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 823, n. 108 (1985).

(referring to J. Wigmore, Evidence § 1395, p. 153 [Chadbourne, rev. 1974]). The Court did not hold that a witness has to become terrified or psychologically traumatized in order to satisfy a defendant's right to confrontation. Rather, the Sixth Amendment is satisfied when the confrontation is sufficient to stir the witness's conscience by virtue of the knowledge that the witness's accusations will have serious consequences for the accused—the person who is watching the testimony. *See Mattox v. United States*, 156 U.S. 237, 242 (1895) (confrontation has the effect of "sifting the conscience of the witness"). Because two-way closed-circuit television is capable of producing the requisite subjective effect upon a witness's conscience, a defendant's Confrontation Clause rights are fully protected.

The core purpose of the Confrontation Clause is to ensure that testimony offered against a defendant be truthful. *United States v. Inadi*, 475 U.S. 387, 398 (1986). Testimony provided via two-way closed-circuit television advances that core purpose. It would be a perversion of the Confrontation Clause to allow only traditional in-court testimony, and thereby prevent many child abuse victims from having their complaints heard under conditions bearing sufficient indicia of reliability.

The Court forewarned in *Mattox* that "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. at 243. The use of testimony via two-way closed-circuit television systems satisfies the letter and spirit of the Confrontation Clause.

B. There is a compelling state interest in protecting child victims of sexual abuse.

Child abuse is an ever-growing problem that is devastating this country. This is evidenced by the fact that, "[f]rom 1976 to 1985, annual reports of child maltreatment made to designated public agencies increased dramatically, leaping nearly threefold from 669,000 reports to over 1.9 million. Reports

of child sexual abuse have risen at an even more alarming rate. By 1985, 12 percent of all reported child maltreatment involved sexual abuse allegations." *Amicus Curiae* Brief of American Bar Association at 8, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (citing American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985*, at 3, 16 [1987]). By 1988, annual reports of child maltreatment had grown to 2.2 million with reports of child sexual abuse accounting for up to 16% of the total or 374,000 child sexual abuse reports. *See* Daro and Mitchell, *Child Abuse Fatalities Continue to Rise: The Results of the 1988 Annual Fifty State Survey*, National Committee for the Prevention of Child Abuse (1989). Moreover, it has been estimated that the number of unreported cases of child sexual abuse is more than triple the number of reported cases. *See Criminal Procedure—Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation—Coy v. Iowa*, 11 Campbell L. Rev. 381, at 381 (1989).

Child abuse is an especially pervasive problem in New York, and one that has grown significantly in recent years. The New York State Department of Social Services received more than 104,000 reports of child abuse and neglect in 1987. New York State Department of Social Services, *New York State Child Abuse and Maltreatment Register Report Number 410*, at 70 (January 2, 1988). This figure increased to more than 130,000 reports in 1989. *Id.* at 70 (January 7, 1990). In New York City alone, reports of child abuse and neglect increased from approximately 41,000 in 1986 to 59,353 reports in 1989. *The Mayor's Management Report* (City of New York, September 17, 1989).

In addition, because the majority of child abusers were themselves sexually abused as children, unrestricted incidents of child sexual abuse lead to an "intergenerational cycling" of learned abusive behavior. *Child Sexual Abuse*, pp. 19-20 (M. McCabe, R. Cohen, V. Weiss eds. 1985). Studies have shown that sexual victimization of children has had profoundly harmful effects on both children and society. Abused

children often develop related problems of drug abuse, juvenile delinquency, juvenile prostitution, adult clinical depression, and similar difficulties. Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings, reprinted in Oversight Hearings to Consider the Testimony of Children in Sexual Abuse Cases Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2nd Sess. 184 (May 2 and 22, 1984) (studies omitted). Also, child sex offenders are often repeat offenders. *Child Sexual Abuse* at 13.

Restraint and treatment are therefore necessary to prevent a continuing pattern of abusive behavior. *Id.* One of the most effective ways to stop this cycle of violence and abuse is to prosecute child molesters to conviction. This will both stop the convicted abuser from continuing his or her criminal behavior and will deter others from committing such crimes.

However, prosecution of child abuse cases has proven difficult for a variety of reasons. As this Court recently noted, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Indeed, there is a never-ending list of hurdles to overcome in successfully prosecuting child abuse cases, including: (i) the young victim is often incapable of testifying under oath (*see, e.g., Kentucky v. Stincer*, 482 U.S. 730, 732 n.1 [1987] [noting that Stincer was originally charged with committing one count of first-degree sodomy (Ky. Rev. Stat. § 510.070 [1985]) against five-year-old B.H. but the prosecutor was compelled to dismiss this count because it did not believe B.H. was competent to testify]); (ii) the child's parents are often reluctant, if not steadfastly opposed, to having their child relive the trauma of the crime by testifying (*see* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New Eng. L. Rev. 643, 647-56 [1982]); (iii) there is often no conclusive, if any, medical evidence to corroborate the alleged abuse (*see* Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27, 35 [March 1987] [estimating that there is no medical or physical evidence in more

than 80% of child sexual abuse cases]); (iv) the child's disclosure of the abuse is often belated, due to deadly threats by the abuser or the child's belief that the child has done something wrong, and as a result, the child's memory of the crime at the time of disclosure may not be as precise as it was closer in time to the crime (*see* DeFrancis *Protecting the Child Victim of Sex Crimes Committed by Adults, Final Report* 64, 217-18 [1969] [*noted in* S. Katz and M. Mazur, *Understanding the Rape Victim* at 190 (1979)]); and, (v) even if there are any eyewitnesses to the abuse, they may be unwilling to testify against the abuser who is often a member of the witness's family or a close friend. *See* Conte and Berliner, *Sexual Abuse of Children: Implications for Practice*, J. Contemp. Soc. Work 601, 603 (1981). In brief, because there are inherent difficulties in prosecuting these horrible crimes, most child abusers unfortunately remain free to continue committing the same or similar crimes. *See* Whitcomb, Shapiro and Stellwagen, *When the Victim is a Child*, United States Department of Justice, National Institute of Justice, p. i (Washington, D.C.: Government Printing Office, 1985) (estimating that more than 90% of all child abuse cases do not go forward) (*cited and referred to in* The Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, *The Investigation and Prosecution of Crimes Against Children in New York State* at 191 [1988]).

Against this dismal backdrop, it hardly can be disputed that the protection of child abuse victims is a compelling state interest. Protection of a youthful victim of sexual abuse by allowing the child to testify outside of the physical presence of the alleged abuser, who has often assumed a role of superiority in the child's life, will undoubtedly alleviate some of the difficulties in the prosecution of these cases. *See, e.g., People v. Algarin*, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (Sup. Ct. Bx. Co. 1986) (child victims, aged 4-6, attended day care center where defendant worked); *Glendening v. State*, 536 So.2d 212 (Fla. 1989) (13 1/2-year-old child sexually abused by father); *Brady v. State*, 540 N.E.2d 59 (Ind. App. 3d Dist. 1989) (4-year-old child sexually abused by father). First, it will minimize the potential trauma to the

child witnesses arising from the requirement of testifying in close physical proximity to their attackers, who have often threatened them or their families with death or injury if they reveal the abuse. Second, it will encourage reports of such abuse, which might otherwise go unreported because child victims and their parents will not fear "a second victimization" as a result of the testimony. Third, where a child is incapable of testifying against his or her abuser in the abuser's presence, the child now will be able to provide the evidence necessary to try the abuser and thereby save the case from dismissal. Hence, there is a compelling state interest in the protection of these unfortunate child victims and in the successful prosecution of their abusers. *See Coy v. Iowa*, 108 S. Ct. at 2805 (O'Connor, J., concurring) ("our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses"). *See generally Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (recognizing the government's "compelling" interest in "safeguarding the physical and psychological well-being of a minor [victim]" and allowing "the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates [courtroom] closure").

C. A case-specific finding either that the child cannot communicate in the defendant's presence or that the child will suffer severe mental or emotional harm were the child to testify in the defendant's presence is sufficient to establish the need to use closed-circuit television.

This Court, in *Ohio v. Roberts*, 448 U.S. at 65-66, set forth a two-part test for determining when the right to confrontation will yield to permit the admission of hearsay statements to further an important state interest. First, there must be a necessity for an exception in a particular case. *Id.* at 65. Second, the evidence sought to be admitted under the exception must bear adequate indicia of reliability. *Id.* at 65-66. The testimony of a child, which is simultaneously transmitted to the jury for its immediate scrutiny, bears as much, if not

greater, indicia of reliability than out-of-court hearsay statements whose reliability can be tested only by after-the-fact examination. Consequently, the Court should not impose a more stringent test than that of *Ohio v. Roberts* to determine the admissibility of any form of closed-circuit television in a particular case of child abuse.

While a generalized, presumed, legislative finding of necessity is insufficient to satisfy the necessity prong permitting an exception to the Confrontation Clause, a case-specific finding of necessity is sufficient. *Coy v. Iowa*, 108 S. Ct. at 2803; *Id.* at 2803-05 (O'Connor, J., concurring). In allowing a child victim of sexual abuse to testify via closed-circuit television, there are two specific needs that can satisfy this requirement, either of which is sufficient. One need relates to the child, and the other to the child's testimony. First, as was shown in *Craig v. Maryland*, the necessity requirement can be established by a showing that the child will suffer "serious emotional distress such that the child cannot reasonably communicate." *Craig v. Maryland*, 316 Md. 551, ____, 560 A.2d 1120, 1121 (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989 Repl. Vol.). In this situation, the need is to obtain the child's obviously relevant testimony.

Second, the necessity requirement may be satisfied by a showing that as a result of giving trial testimony without the use of closed-circuit television the "child witness will suffer severe mental or emotional harm." N.Y. Crim. Proc. Law § 65.10(1) (McKinney Supp. 1990). In this situation, the need is to protect the child from suffering serious psychological injury, additional to the injury the child has already suffered as a victim of abuse.

Indeed, the Maryland court in *Craig* did not dispute that either of these two needs could, in a particular case, be sufficient to allow child sexual abuse victims to testify via closed-circuit television. *Craig v. Maryland*, 560 A.2d at 1127. Rather, the court ruled that while either need may be sufficient, the prosecution must establish that the need would arise from the child witness testifying in the defendant's presence, and that the need would not result merely from the child witness testifying in open court. *Id.*

Moreover, there is good reason for allowing an adequate showing of either of these two needs to warrant the admission of testimony that does not comply strictly with the Confrontation Clause. A showing of necessity based on the child's inability to communicate is sufficient because such a showing would establish the functional equivalent of the child's unavailability. Surely if a child witness is unable to speak about the crime in the defendant's presence, the child is unavailable to testify in open court as a witness for the prosecution. Thus, an adequate showing of the child's inability to communicate, which renders the child unavailable, is sufficient to warrant allowing the child to testify via closed-circuit television. *See Ohio v. Roberts*, 448 U.S. at 65 (in the usual case, the necessity requirement alleviating the need for strict compliance with the Confrontation Clause is established when the prosecution demonstrates the physical unavailability of the declarant whose statement it wishes to use against the defendant); *Nelson v. Farrey*, 874 F.2d at 1231, 1233 (concurring opinion) (three-year-old victim of sexual abuse unavailable to testify where child "could not provide meaningful testimony about the alleged assault," even though child "was readily identified and located and could have easily been transported to trial").

Similarly, a showing that a child witness would suffer severe mental or emotional harm were the child forced to testify in open-court in the defendant's presence, and that the extent of this harm would likely be decreased if the child were permitted to testify via closed-circuit television, is a sufficient need for allowing the child to testify via closed-circuit television. In such a case, the state prosecutor should not be placed in the intolerable position of having to choose between inflicting psychological harm on the child or abandoning a warranted criminal prosecution against a child molester. Thus, in this situation too the child is functionally equivalent to an unavailable witness. *Cf. Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986) (sexual assault victim was "unavailable" to testify at defendant's trial, where she had been admitted to psychiatric ward suffering from psychological illness, and, if forced to confront defendant, would suffer a substantial

relapse of mental illness); *Warren v. United States*, 436 A.2d 821, 828-29 (D.C. App. 1981) (rape victim "unavailable" to testify where two psychiatrists concluded that if victim were forced to testify victim would suffer severe psychological injury); *People v. Lombardi*, 39 A.D.2d 700, 701 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 658 (1973), *cert. denied*, 416 U.S. 906 (1974) (rape victim "unavailable" to testify at defendant's trial where her husband and her psychiatrist testified that if she were required to appear and testify in person, her mental and physical health would have been seriously jeopardized).[6]

Furthermore, the state has a special obligation to prevent a child witness from suffering harm because the state, in exercising its *parens patriae* role, has a special duty to protect children. *See, e.g., In re Gault*, 387 U.S. 1, 14-18 (1967). The state has a unique obligation to its children and, when there are reasonable steps that the state can take to protect its child victims from suffering further trauma that do not impair a defendant's rights in any substantial way, the state should have the power to do so. Indeed, it is the state's duty, through its legislative and judicial powers, to care for the welfare of all its children, particularly when parents do not, as is often the case for child victims of sexual abuse. *See* Libai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 985 (1969); Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick L. Rev. 721, 785 (1985).

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6 *Also cf., United States v. Lansky*, 496 F.2d 1063 (5th Cir. 1974) (conviction for criminal contempt for failing to respond to subpoena to appear before grand jury reversed where physician had advised defendant, due to his poor health, not to travel and to avoid any physical and emotional stress); *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963) (dismissing contempt proceedings against defendant for failing to comply with grand jury subpoena because defendant actually believed that compliance with subpoena would create a risk of harm to his health, regardless of whether defendant's health was actually at risk).

D. The reliability of testimony obtained via closed-circuit television can be tested in the same manner and to the same extent as can the reliability of testimony given in open court.

The second part of the *Roberts* test is whether the evidence sought to be admitted bears adequate indicia of reliability despite the lack of face-to-face confrontation. *Ohio v. Roberts*, 448 U.S. at 65-66. A child's testimony via closed-circuit television satisfies this requirement because it has "particularized guarantees of trustworthiness." *Id.* at 66. Indeed, the reliability of such testimony may be tested in the same way as traditional in-court testimony: it is subject to cross-examination, and the fact-finder has an opportunity to observe and assess the demeanor and credibility of the child witness under both direct and cross-examinations.

In some cases, the admission of hearsay statements was deemed proper because the statements themselves were inherently reliable. *See, e.g., United States v. Bourjaily*, 483 U.S. 171, 181-84 (1987) (co-conspirator statements); *Lee v. Illinois*, 476 U.S. 530, 551 n. 4 (1986) (statements against penal interest) (Blackmun, J., dissenting, recognizing generally that "most jurisdictions now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest"); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations); *United States v. Napier*, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975) (excited utterances). In other cases, including those concerning the propriety of the admission of hearsay statements in the form of prior testimony, this Court has found that the reliability requirement had been satisfied because the defendants and their counsel had an opportunity to cross-examine the declarants of the hearsay statements and the triers of fact, thus, had been afforded satisfactory bases for evaluating the truth of the prior statements. *See Ohio v. Roberts*, 448 U.S. 71; *California v. Green*, 399 U.S. 149 (1970). In those cases, the mere fact that the witnesses had been cross-examined, even though not in front of the jury, rendered the statements sufficiently reliable to permit their introduction where there was

a distinct need for the statements. *See also United States v. Owens*, 484 U.S. 554 (1988) (defendant's right to confrontation satisfied where witness testified to prior out-of-court identification even though, due to memory loss, witness could not explain the basis for the identification, because defendant given opportunity to cross-examine witness); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam) (defendant's right to confrontation satisfied where expert witness testified as to what opinion he had formed, but could not recollect the basis on which he had formed it, because defendant given opportunity to cross-examine witness).

Similarly, when the prosecution seeks to procure the needed testimony of a child via closed-circuit television, the testimony should be admissible because in that situation defense counsel will have a full opportunity to cross-examine the witness. Such cross-examination will allow counsel to challenge whether the child is sincerely telling what the child believes to be the truth, whether the child accurately perceived and remembers the matter the child is relating, and whether the child's intended meaning is adequately conveyed by the language the child employs. *See Ohio v. Roberts*, 448 U.S. at 70-71 (referring to these three goals as the objectives of cross-examination, and finding that, when a defense attorney has the opportunity to satisfy these objectives by his questioning of a witness, the admission of prior statements does not violate the Confrontation Clause) (citing Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378 [1972]). In addition, the likelihood that unreliable testimony will come before the jury is the same whether the testimony presented to the jury is obtained via closed-circuit television or traditional in-court means, because the child's testimony is live and spontaneous and the child's responses and physical reactions are visible to the jury exactly as they would be if the child were seated on the stand in the courtroom. *See People v. Cintron*, slip op. at 13-14, n.6 (reminding trial courts to be "exacting in their application of all of the statutory limitations and protections [N.Y. Crim. Proc. Law § 65.30 (1)], including those which require that the tele-

vision technology used provide all the trial participants with an adequate opportunity to evaluate the witness's testimony").

Moreover, the statements of a child witness during a trial bear even more assurances of reliability than prior, out-of-court hearsay statements. When a child's testimony is transmitted to the jury via closed-circuit television, the fact-finder is able to observe an accurate image of the child witness as the child is testifying. Thus, the fact-finder is able to evaluate the credibility of the child witness because it is watching the child as he or she makes the statements being considered for their truthfulness, unlike a case involving the admission of a typical hearsay statement where the declarant's demeanor at the time of the out-of-court statement cannot be assessed by the fact-finder in assessing the declarant's credibility. *See, e.g., United States v. Owens*, 484 U.S. at 560 ("when a hearsay declarant is present at trial and subject to unrestricted cross-examination," not necessary for proponent of the evidence to establish particular guarantees of trustworthiness before seeking its admission). Clearly, then, a fact-finder will have an even better opportunity to evaluate the testimony obtained via closed-circuit television than does a fact-finder who has to evaluate former testimony that is admitted into evidence as a hearsay exception. Thus, a child's testimony via closed-circuit television is as reliable as testimony given by a witness who is physically present in the courtroom. Such testimony should, therefore, be admissible.

E. The Confrontation Clause does not dictate the exclusive manner by which a state court may make a case-specific finding of necessity, and in no circumstances does it require the child to testify in the defendant's presence before testimony via closed-circuit television may be admitted into evidence.

The manner in which a prosecutor can demonstrate the need for evidence sought to be admitted under an exception to the Confrontation Clause is a matter best left to the sound discretion of the trial court, in applying the law of the state

in which the court sits. The Confrontation Clause does not require the means by which the proponent must meet its burden, but rather specifies merely what the burden is. Thus, it is up to the individual state, in applying its own rules of evidence, to determine how that burden is to be met.

That the Constitution does not specify the precise manner in which the need for an exception to the Confrontation Clause may be met is consistent with this Court's interpretations of other Constitutional provisions. For example, in deciding that the Due Process Clause of the Fourteenth Amendment to the Constitution permits a prosecutor to use a defendant's confession against the defendant only when there has been a reliable determination that the confession was voluntary, this Court did not require that such voluntariness be proved by any particular piece of evidence. *See Jackson v. Denno*, 378 U.S. 368 (1964). *See also People v. Huntley*, 15 N.Y.2d 72 (1965) (deciding the appropriate procedure in New York for providing the hearing mandated in *Jackson v. Denno*). Thus, in establishing the voluntariness of a confession in a particular case, the prosecutor may present the testimony of the detective who took the statement and administered *Miranda* warnings, if such warnings were given, or the prosecutor may present the testimony of any person present during the interrogation. *See, e.g., United States v. Madison*, 689 F.2d 1300, 1308 (7th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). Surely the prosecutor is not required to present a particular type of evidence, such as psychiatric testimony related to the voluntariness of a defendant's confession, in every such case. *See also, e.g., Costello v. United States*, 350 U.S. 359, 361-62, *reh'g denied*, 351 U.S. 904 (1956) ("The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."); *Gerstein v. Pugh*, 420 U.S. 103, 123-25 (1975) (Fourth Amendment does not require the precise procedure by which state courts are to determine probable cause

so long as the procedure a state may adopt is fair and results in a reliable determination).

Just as the Constitution does not dictate the exact manner in which other Constitutional standards are met, it does not dictate the exact manner in which the prosecution may meet its burden of establishing the need for a child's testimony via closed-circuit television. Thus, in a particular case, the burden of establishing the necessity for testimony via closed-circuit television may be met by the testimony of one, or any combination, of the following potential witnesses: a child care worker, a teacher, a parent or other family member, the child victim, a psychiatrist, a psychologist, an expert in the areas of child abuse or the child abuse accommodation syndrome, or any other witness competent to assess the likely effect on the child of the child's testifying in the defendant's presence in open court.

Thus, while the child certainly may be able to provide probative evidence of his or her inability to testify in front of the defendant in open court such that strict compliance with the Confrontation Clause is not warranted, the actual testimony of the child is not required by the Confrontation Clause. Rather, the nature of the system used, the law of each state, and the necessities of a particular case will determine whether the prosecution can meet its high burden by the testimony of lay and expert witnesses, or whether the child's testimony will be required due to any unique circumstances of the case. *Compare, e.g., Craig v. Maryland*, 560 A.2d at 1127-29 (testimony of an expert alone is insufficient to establish necessity; in light of the Supreme Court's holding in *Coy v. Iowa*, child must attempt to testify in front of defendant before an alternative procedure may be used); *Rhode Island v. Taylor*, ____ R.I. ____, 562 A.2d 445 (1989) (Confrontation Clause of Rhode Island Constitution requires that an attempt must be made to have the child testify in defendant's presence and, if that is unsuccessful, then expert testimony must be provided); *and, People v. Cintron*, No. 241, slip op. at 18-22 (N.Y. Ct.App. January 11, 1990) (court's observation of a child witness cannot alone justify the use of even a two-way closed-circuit television as an alternative to the traditional means of introducing testimony) *with State v. Bonello*, 210 Conn. 51, *cert. denied*, 109 S. Ct. 2103, *reh'g denied*, 109 S. Ct. 3268 (1989) (expert testimony that the reliability and trustworthiness of a child victim's testimony would be undermined by forcing the child to testify in defendant's physical presence was sufficient to establish the need for videotaped testimony outside the presence of defendant); *and State v. Crandall*, 231 N.J. Super. 124, 132, 555 A.2d 35, 39 (1989) ("expert testimony *may* be warranted when defendant challenges utilization of the statutory procedure" whereby a child abuse victim will testify via closed-circuit television) (emphasis added).

Indeed, a rule requiring in every case that the child victim testify at a pretrial hearing in the defendant's presence is illogical to the point of cruelty. Were this the rule, the prosecution's successful showing that the use of closed-circuit television is needed would in many cases be a purely Pyrrhic victory. This would result, for instance, when the child witness would "suffer severe mental or emotional harm" if required to testify in open court in the defendant's presence (N.Y. Crim. Proc. Law § 65.10 [1] [McKinney Supp. 1990]). In this circumstance, it would be inhumane to require the child to testify at a pretrial hearing in the defendant's presence and thereby suffer the very harm the statute authorizing testimony via closed-circuit television seeks to prevent, for in such a case the prosecution's victory will have been won at a staggering cost.[7]

The Court of Appeals of Maryland, however, decided that the Confrontation Clause establishes a *per se* rule that, before a child witness may be permitted to testify via closed-circuit television, the child must attempt to testify in front of the defendant at a pretrial hearing. In its decision, the court stated that the Sixth Amendment, as well as Article 21 of the State Constitution, requires that Maryland's closed-circuit television statute (Md. Cts. & Jud. Proc. Code Ann.

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7 For this very reason, the New York closed-circuit television statute requires that a child not be compelled to testify in the defendant's presence at the pretrial hearing. N.Y. Crim. Proc. Law § 65.20 (6).

§ 9-102[a][1][ii]) cannot be invoked in the face of a confrontation challenge unless the child initially is questioned and is found by the court "to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." *Craig v. Maryland*, 560 A.2d at 1127. Because the Confrontation Clause does not require the particular means by which the prosecution must meet its burden of establishing necessity, and certainly does not require that in every case the burden be met by the child's testimony, the Maryland court was wrong. Accordingly, this Court should remand the case to the Maryland court to decide whether the same *per se* rule should apply to Maryland prosecutors as a matter of state law, in light of this Court's ruling that such a rule is not mandated by the Constitution.

CONCLUSION

THE USE OF TWO-WAY CLOSED-CIRCUIT TELEVISION DOES NOT IMPLICATE THE CONFRONTATION CLAUSE. EVEN IF IT DOES, THE CONFRONTATION CLAUSE DOES NOT REQUIRE THAT A CHILD VICTIM OF SEXUAL ABUSE TESTIFY IN THE DEFENDANT'S PRESENCE AND SUFFER HARM BEFORE EITHER TWO-WAY OR ONE-WAY CLOSED-CIRCUIT TELEVISION MAY BE ADMITTED AT A CRIMINAL TRIAL.

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** The Office of the Kings County District Attorney acknowledges the assistance of Gerard Britton, Student Legal Specialist, in the research and preparation of this brief.

APPENDIX

NEW YORK'S CLOSED-CIRCUIT TELEVISION STATUTE

ARTICLE 65—USE OF CLOSED-CIRCUIT TELEVISION FOR CERTAIN CHILD WITNESSES [NEW]

SECTION

65.00 Definitions.
65.10 Closed-circuit television; general rule; declaration of vulnerability.
65.20 Closed-circuit television; procedure for application and grounds for determination.
65.30 Closed-circuit television; special testimonial procedure.[1]

§ 65.00 Definitions

As used in this article:

1. "Child witness" means a person twelve years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty of the penal law or section 255.25 of such law which is the subject of such criminal proceeding.

2. "Vulnerable child witness" means a child witness whom a court has declared to be vulnerable.

3. "Testimonial room" means any room, separate and apart from the courtroom, which is furnished comfortably and less formally than a courtroom and from which the testimony of a vulnerable child witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.

4. "Live, two-way closed-circuit television" means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room in accordance with the provisions of section 65.30.

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1 So in original. Does not conform to section catchline.

5. "Operator" means the individual authorized by the court to operate the closed-circuit television equipment used in accordance with the provisions of this article.

6. A person occupies "a position of authority with respect to a child" when he or she is a parent, guardian or other person responsible for the custody or care of the child as to the relevant time or is any other person who maintains an ongoing personal relationship with such parent, guardian or other person responsible for custody or care, which relationship involves his or her living, or his or her frequent and repeated presence, in the same household or premises as the child.
(Added L. 1985, c. 505 § 1).

§ 65.10 Closed-circuit television; general rule; declaration of vulnerability

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by clear and convincing evidence that it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm.

2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30, authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

3. Nothing herein shall be contrued[1] to preclude the court from exercising its power to close the courtroom or from

1 So in original. Probably should be "construed".

exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.
(Added L. 1985, c. 505 § 1).

§ 65.20 Closed-circuit television; procedure for application and grounds for determination

1. Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable.

2. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.

3. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.

4. The answering papers may admit or deny any of the alleged facts and may, in addition, contain sworn allegations of fact relevant to the motion, including the rights of the defendant, the need to protect the child witness and the integrity of the truth-finding function of the trier of fact.

5. Unless all material facts alleged in support of the motion made pursuant to subdivision one of this section are conceded, the court shall, in addition to examining the papers and hearing oral argument, conduct an appropriate hearing for the purpose of making findings of fact essential to the determination of the motion. Except as provided in subdivision six of this section, it may subpoena or call and examine witnesses, who must either testify under oath or be permitted to give unsworn testimony pursuant to subdivision two of

section 60.20 and must authorize the attorneys for the parties to do the same.

6. Notwithstanding any other provision of law, the child witness who is alleged to be vulnerable may not be compelled to testify at such hearing or to submit to any psychological or psychiatric examination. The failure of the child witness to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section. Prior statements made by the child witness relating to any allegations of conduct constituting an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law or to any allegation of words or conduct constituting an attempt to prevent, impede or deter the child witness from cooperating in the investigation or prosecution of the offense shall be admissible at such hearing, provided, however, that a declaration that a child witness is vulnerable may not be based solely upon such prior statements.

7. (a) Notwithstanding any of the provisions of article forty-five of the civil practice law and rules, any physician, psychologist, nurse or social worker who has treated a child witness may testify at a hearing conducted pursuant to subdivision five of this section concerning the treatment of such child witness as such treatment relates to the issue presented at the hearing, provided that any otherwise applicable statutory privileges concerning communications between the child witness and such physician, psychologist, nurse or social worker in connection with such treatment shall not be deemed waived by such testimony alone, except to the limited extent of permitting the court alone to examine in camera reports, records or documents, if any, prepared by such physician, psychologist, nurse or social worker. If upon such examination the court determines that such reports, records or documents, or any one or portion thereof, contain information material and relevant to the issue of whether the child witness is a vulnerable child witness, the court shall disclose such information to both the attorney for the defendant and the district attorney.

(b) At any time after a motion has been made pursuant to subdivision one of this section, upon the demand of the other party the moving party must furnish the demanding party with a copy of any and all of such records, reports or other documents in the possession of such other party and must, in addition, supply the court with a copy of all such reports, records or other documents which are the subject of the demand. At any time after a demand has been made pursuant to this paragraph, the moving party may demand that property of the same kind or character in possession of the party that originally made such demand be furnished to the moving party and, if so furnished, be supplied, in addition, to the court.

8. (a) Prior to the commencement of the hearing conducted pursuant to subdivision five of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 240.45 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness.

(b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision two of section 240.45 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

9. The court may consider, in determining whether there are such extraordinary circumstances as would cause the child witness to suffer severe mental or emotional harm, a finding that any one or more of the following factors have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness.

(k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law.

(l) According to expert testimony, the child witness would be particularly suceptible[1] to psychological harm if required

1 So in original. Probably should read "susceptible".

to testify in open court or in the physical presence of the defendant.

10. Irrespective of whether a motion was made pursuant to subdivision one of this section, the court, at the request of either party or on its own motion, may declare a child witness to be vulnerable when it determines from its own observations that a child witness who has been called to testify at a criminal proceeding is suffering severe mental or emotional harm and therefore is physically or mentally unable to testify or to continue to testify in open court or in the physical presence of the defendant and that the use of live, two-way closed-circuit television is necessary to enable the child witness to testify.

11. In deciding the motion made pursuant to subdivision one of this section, the court shall make findings of fact which reflect the causal relationship between the existence of any one or more of the factors set forth in subdivision nine of this section or other relevant factors which the court finds are established and the determination that the child witness is vulnerable. If the court is satisfied that the child witness is vulnerable and that, under the facts and circumstances of the particu[1]ar case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired, it may enter an order granting the application for the use of live, two-way closed-circuit television.

12. When the court has determined that a child witness is a vulnerable child witness, it shall make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm, the order entered pursuant to subdivision eleven of this section shall direct that the defendant remain in

the courtroom during the testimony of the vulnerable child witness.
(Added L. 1985, c. 505 § 1.)

§ 65.30 Closed-circuit television; special testimonial procedures

1. When the court has entered an order pursuant to section 65.20, the testimony of the vulnerable child witness shall be taken in the testimonial room and the image and voice of the vulnerable child witness, as well as the image of all other persons other than the operator present in the testimonial room, shall be transmitted live by means of closed-circuit television to the courtroom. The courtroom shall be equipped with monitors sufficient to permit the judge, jury, defendant and attorneys to observe the demeanor of the vulnerable child witness during his or her testimony. Unless the courtroom has been closed pursuant to court order, the public shall also be permitted to hear the testimony and view the image of the vulnerable child witness.

2. In all instances, the image of the jury shall be simultaneously transmitted to the vulnerable child witness in the testimonial room. If the court order issued pursuant to section 65.20 specifies that the vulnerable child witness shall testify outside the physical presence of the defendant, the image of the defendant and the image and voice of the person examining the vulnerable child witness shall also be simultaneously transmitted to the vulnerable child witness in the testimonial room.

3. The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the vulnerable child witness to be transmitted to the courtroom but limits the ability of the vulnerable child witness to see or hear the operator or the equipment.

4. Notwithstanding any provision of this article, if the court in a particular case involving a vulnerable child witness determines that there is no live, two-way closed-circuit television

equipment available in the court or another court in the county or which can be transported to the court from another county or that such equipment, if available, is technologically inadequate to protect the constitutional rights of the defendant, it shall not permit the use of the closed-circuit television procedures authorized by this article.

5. If the order of the court entered pursuant to section 65.20 requires that the defendant remain in the courtroom, the attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney and will not encourage the jury to draw an inference adverse to the interest of the defendant.

6. Upon request of the defendant, the court shall instruct the jury that they are to draw no inference from the use of live, two-way closed-circuit television in the examination of the vulnerable child witness.

7. The vulnerable child witness shall testify under oath except as specified in subdivision two of section 60.20. The examination and cross-examination of the vulnerable child witness shall, in all other respects, be conducted in the same manner as if the vulnerable child witness had testified in the courtroom.

8. When the testimony of the vulnerable child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the textimony[1] in the same manner as if the vulnerable child witness had testified in the courtroom.
(Added L. 1985, c. 505, § 1.)

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1 So in original. Probably should be "testimony".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari To The Court Of Appeals Of Maryland

Brief of Amicus Curiae On Behalf of the National Association of Counsel for Children; The National Court Appointed Special Advocate Association; The State Of Alaska, Office of Public Advocacy; and The State of Rhode Island, Office of The Child Advocate In Support of Petitioner

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Question Presented

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, age four to seven, are subjected to cross examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be utilized?

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Interest of Amici Curiae

The National Association of Counsel for Children (NACC) is a voluntary, national membership organization concerned with the rights and interests of children who are the subjects of child protective, matrimonial, and custody litigation. Established in 1977, the association has over 1,100 members in 50 states. Membership is predominantly lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, "The Guardian".

The National Court Appointed Special Advocate Association (NCASAA) is a nonprofit member organization which advocates for the best interest of abused and neglected children, and supports the development, growth and continuation of programs which recruit and train volunteers to serve as advocates for children in juvenile dependency proceedings. Presently there are 377 Court Appointed Special Advocate (CASA) programs in 47 states in this country. The CASA concept has been endorsed by the National Council of Juvenile and Family Court Judges, the American Bar Association, the United States Department of Justice, and many other private and public organizations.

The State of Alaska, Office of Public Advocacy (OPA), is the state agency which has been designated by the Alaska State Legislature to provide legal representation for children as counsel and/or guardian ad litem in child abuse and neglect cases, child custody proceedings, and in criminal matters regarding the protection of child witnesses.

The State of Rhode Island, Office of the Child Advocate (OCA) is the state agency designated by the Rhode Island General Assembly to protect the legal, civil and special

rights of abused and neglected children in state care and in day care settings.

The interest of NACC, NCASAA, OCA, and OPA, who submit this brief as *amici curiae* with the consent of the parties, goes beyond a generalized concern over the legal rights of children. The members of NACC, NCASAA, OCA, and OPA are involved in representing children throughout our country. Because we believe the case below was wrongly decided, and because it involves important questions of law which have not been, but should be, settled by this Court, and because the interests of children are directly and adversely affected by this decision, we join the Petitioner in urging the Court to reverse the Maryland court's holding that face-to-face confrontation is a prerequisite to utilizing the one-way closed circuit television procedure of Section 9-102.

Summary Of The Argument

The Court of Appeals of Maryland erred in interpreting *Coy* v. *Iowa*, 487 U.S. ___ , 108 S. Ct. 2798 (1988) so as to require that a young child exhibit "severe emotional distress" from a confrontation with the defendant prior to utilization of Maryland's statutory procedure for taking testimony via one-way closed circuit television. (pp. 4-6).

Although the specific statutory exception created by the Maryland statute is not "firmly rooted" in our jurisprudence, the strong policy of protecting children is "firmly rooted". This Court has long characterized as compelling the state's interest in protecting children from harm. Moreover, common law accommodations for young child witnesses date back to at least 1901 and include a wide variety of accommodations including 1) use of the *res gestae*, fresh complaint, and spontaneous declaration hearsay exceptions, 2) restrictions on pre-trial interviews, and 3) use of leading questions. (pp. 6-9).

Empirical research indicates that testifying in the same manner as an adult is associated with increased behavioral disturbance in children and that children are less likely to

report sexual abuse than are adults. Because authorities agree that young children are less likely to report abuse and that even if reported the chance of successful prosecution is remote, an individualized finding of inability to reasonably communicate based on expert testimony is a sufficient showing of necessity for utilization of closed circuit television. (pp. 10-16).

Closed-circuit television testimony is reliable, subject to contemporaneous cross-examination, and allows the fact-finder to view the demeanor of the witness. The totality of the circumstances surrounding the testimony determines reliability; unavailability speaks only to necessity. Many cases have stated that the Confrontation Clause is not violated where the statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. (pp. 16-17.)

A substantial number of pre- and post-*Coy* state court decisions hold that confrontation can be curtailed after a sufficient showing of trauma. This showing is somewhat less than that trauma which would render the child psychologically unavailable. In order to protect child witnesses it is necessary that face-to-face confrontation be curtailed upon a showing that a child cannot testify without significant emotional or physical trauma. Such findings should not normally require a preliminary face-to-face confrontation demonstrating the very trauma the process is meant to obviate. (pp. 17-19).

Many authorities opine that avoiding a face-to-face confrontation between the child and the accused enhances the truthfulness of the child's testimony, so that the use of protective measures can actually further the purpose behind the Confrontation Clause. Amici request that this Court, in upholding the Maryland statute, articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon a showing that it would enhance the truthfinding process. Such findings should not normally require a preliminary face-to-face confrontation

to demonstrate the distortion of the truthfinding process. (pp. 20-23).

Where a defendant has promised severe retribution for answering questions about what the defendant did to the child, these threats constitute a forfeiture or waiver of the defendant's right to face-to-face confrontation when a child could effectively testify face-to-face with the accused but only with experiencing severe fear associated with the threatening behavior. (pp. 24-26).

Unavailability pertains to necessity and therefore is not required for admissibility of testimony when, as under Section 9-102, there is contemporaneous cross-examination and sufficient indicia of reliability. If this Court determines that unavailability must be shown, the Court should not give unavailability the strictest literal meaning, but rather it should equate unavailability with inability to testify because of suffering significant psychological or physical harm. There is much precedent for expanding unavailability to include psychological unavailability. (pp. 26-30).

The Amici's interest extends beyond that of the Attorney General of Maryland who seeks to have the Supreme Court uphold as constitutional the Maryland statute here involved. The Amici seek an articulation of Confrontation Clause principles which would permit, or leave for review until another day, numerous variations on the Maryland statute which have been enacted by other state legislatures. (*See* Appendix).

Argument

I. The Court of Appeals of Maryland Erred In Ruling That A Young Child Must Suffer a Face-to-Face Confrontation With The Accused In Order to Demonstrate such "Severe Emotional Distress" That She Cannot Reasonably Communicate as a Prerequisite to Utilization of Maryland's Statutory Procedure For Taking Testimony Via One-Way Closed Circuit Television.

Relying on *Coy* v. *Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988), the Maryland court below invalidated a testimony

taking statutory procedure protective of vulnerable, abused young children based on its mistaken belief that expert opinion that the children would be traumatized was an insufficient justification for utilizing one-way closed circuit television. If the Maryland Court's procedure is upheld by this Court, then a young child must be first subjected to a face-to-face confrontation with the alleged abuser and exhibit "severe emotional distress" as well as inability to "reasonably communicate" during this confrontation. *See Craig* v. *State*, 316 Md. 551, ___, 560 A.2d 1120, 1127-1128 (1989), *cert gr.*, 107 L. Ed. 2d 830 (1990).

Then the child must be re-tested to see if he or she is capable of testifying via two-way television. Only if the victim proves to be demonstrably unable to proceed using two-way television may the child finally be permitted to testify by closed circuit television as provided for in the Maryland statute. 560 A.2d at 1128.

In all likelihood, however, after being twice traumatized, the child will be permanently rendered incapable of testifying before the one-way closed circuit procedure could ever be utilized. Thus, the Maryland Court of Appeals has mandated a procedure which not only defeats the important public policy considerations of the Maryland statute, i.e. protection of the child witness from trauma, but also which is likely to cause that testimony to be lost permanently.

Although the court below was correct in concluding that individualized findings of necessity satisfy the Sixth Amendment, the court demanded far more than what is necessary in concluding that these individualized findings could not be based on expert and lay testimony other than the child's own testimony taken face-to-face with the alleged abuser.

The United States Supreme Court in *Coy* v. *Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2803 (1988) invalidated the use of a screen between the child witness and the defendant during trial but left "for another day" the question whether any exception to face-to-face confrontation should be made

on public policy grounds. Justices O'Connor and White, concurring made it clear that "a case-specific finding of necessity" would pass constitutional muster, stressed that the right to face-to-face confrontation is not absolute but only a "preference", and indicated that the majority decision did not "necessarily doom" efforts by state legislatures to protect child witnesses. 487 U.S. at ___, 108 S.Ct. at 2803-2805. Justice Blackmun and Chief Justice Rehnquist, dissenting and approving the screened testimony taking, noted that "as the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace." 487 U.S. at ___, 108 S.Ct. at 2809.

If the Supreme Court upholds the Maryland decision it would doom efforts of the Maryland legislature and the efforts of numerous other state legislatures to protect child witnesses.

A. The Public Policy of Protecting Children Constitutes A Compelling Government Interest and the Practice of Making Accommodations for Child Witnesses Is "Firmly Rooted" In Our Jurisprudence.

Despite the relatively recent vintage of state statutes promulgated to protect child witnesses, *see Coy*, 108 S.Ct. at 2803, the policies underlying these statutes of child protection and accommodation for child witnesses are "firmly rooted" in our jurisprudence. This Court has long characterized the state's interest in protecting children from harm as a compelling interest. *See, e.g., New York* v. *Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor" is indeed a compelling state interest); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

The highest courts of the states are in accord. *E.g., State* v. *Jarzbek*, 204 Conn. 683, 700-703, 529 A.2d 1245, 1253-54 (1987), *cert. denied*, 484 U.S. 1061 (1988); *People* v. *Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334, 258 N.Y.S.2d 391, 392 (1965) (Field, J., concurring) (characterizing society's interest in welfare of children as "transcendent"); *State* v. *Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744, 750 (1982) ("Society's increasing awareness of the needs of victim-witnesses in the criminal justice system has coincided with society's increased awareness of and growing concern about incest and child abuse, crimes that particularly affect children. The legal system must be examined to determine the traumatic effects the system may have on children who take the witness stand."); *Glendening* v. *State*, 536 So.2d 212, 218 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989) (". . . . the protection of a child witness from the trauma of testifying in open court in the presence of the defendant, when it is demonstrated that there is substantial likelihood that such trauma would result, is a public policy of such importance as to justify a trial procedure that calls for something other than face-to-face confrontation.")

Common law accommodations for young child witnesses date back to at least 1901. *See* Parker, "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator," 17 *New England L. Rev.* 643, 674-677 (1982); and J. Myers, *Child Witness Law and Practice* §§ 5:31-5:37 (1987).

One way in which the common law has long accommodated child witnesses is by restrictions on pre-trial interviews. *See, e.g., Hayes* v. *State*, 152 Ga.App. 858, 264 S.E.2d 307 (1980) (9-year old victim of child molestation); *Baker* v. *State*, 47 So.2d 728 (Fla. 1950) (in certain instances limits on interviews are subject to a proper exercise of judicial discretion reposed in the trial judge); *State* v. *Wise*, 101 Ariz. 315, ___, 419 P.2d 342, 344 (1966) (rape of a 10-year old child is among the "exceptional circumstances [in which] counsel should be barred from interviewing a witness"); *Mackie* v. *State*, 138 Miss. 740, 103 So. 379 (1925) (children aged seven, nine, eleven and fif-

teen who had witnessed defendant kill their mother spared pre-trial interviews).

There are numerous other ways in which accommodations for child witnesses are "firmly rooted" in our jurisprudence, such as, the allowance of the use of leading questions when a child is testifying. The Advisory Committee on the Federal Rules of Evidence expressly noted the propriety of leading questions with "the child witness or the adult with communication problems." Fed. R. Evid. 611(c), Advisory Committee's Note. Many cases approve leading questions during direct examination of children. *See, e.g., United States* v. *Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983); *United States* v. *Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); J. Myers, *Child Witness Law and Practice* § 4.6, at 130 n.16 (1987) (collecting cases).

The policies underlying Maryland's one-way closed circuit television statute are at least as "firmly rooted" as the *res gestae* hearsay exception, which is often utilized as a way of obtaining a young child's testimony without having to place the child on the witness stand. A good recent example is *Commonwealth* v. *Rockwood*, 27 Mass. App. Ct. 1137, 538 N.E.2d 40 (1989) in which a mother

> "Had brought the child to a therapist, Linda Simon. Within a month or so of resumption of therapy in November, 1986, the child began to relate that she and her father slept in the same bed during the overnight visits. On at least one occasion, he had placed his hand on the child's 'private' and prompted her to 'please touch my dick.' The victim also described the molestation to Jane Zundell of the Norfolk District Attorney's sexual assault unit." *Id.* at 1138, 538 N.E.2d at 41.

The Court held that:

> "The judge properly allowed Simon and Zundell to give fresh complaint testimony. Reception in evidence of the child's complaints made four to six months after the sexual assault is well within the court's discretion. See *Commonwealth* v. *Comtois*, 399 Mass. 668, 672-673 N.9, 506 N.E. 2d 503 (1987) (nine-month-old complaint); *Commonwealth v. Amirault*, 404 Mass. 221, 228-229, 535 N.E. 2d 193 (1989) (eighteen-month-old complaint)." *Id.* at 1139-1140, 538 N.E.2d at 42 (some citations omitted).

Accord People v. *Wade*, 181 Cal. App. 2d 314, 315-316, 5 Cal. Rptr. 63, 64 (1960) ("general rule that evidence of a complaint made is inadmissible under the hearsay rule unless the alleged victim has testified to the acts which occasioned the complaint, inapplicable when the victim is too young to be a competent witness"); *State* v. *Hummel*, 132 N.J. Super. 412, 334 A.2d 52, *certif. denied*, 67 N.J. 102, 335 A.2d 54 (1975) (statement admitted under "fresh complaint rule" even though three years had elapsed since rape).

Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1984 Repl. Vol., 1988 Cum. Supp.) provides for the utilization of a closed circuit television procedure only if:

> "The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

Clearly, this legislation provides greater protection to the accused than does the current caselaw on fresh complaint discussed above which, unlike Section 9-102, has no requirement of a specific finding of "serious emotional distress such that the child cannot reasonably communicate" and does not provide for cross-examination. In short, the government's interest in protecting children is compelling and solicitude for child witnesses is firmly rooted in our jurisprudence.

B. A Court May Base Its Finding of Necessity For the Use of Closed Circuit Television On Expert Testimony That A Child Witness' "Severe Emotional Distress" Renders Her Unable to Communicate Face-to-Face With the Accused.

It is well-established that if one were to write a handbook for perpetrators of sexual assaults, the first tenet would be to only attack young children because they are much less likely to report[1] the assault and even if reported

[1] It is estimated that the actual incidence of sexual abuse is two to fifty times higher than the 100,000 cases reported each year, largely because of the trauma of pre-trial and trial procedures for the complaining witness. De Francis, "Protecting the Child Victim of Sex Crimes Committed by Adults," 35 *Fed. Prob.* 15, 17 (Sept. 1971). A younger child is even more likely to delay in reporting the assault than is an older victim. Peters, Social Psychiatric A. 128th Annual Meeting (May 7, 1975, as reprinted in S. Katz & M. Mazur, *Understanding the Rape Victim* 190, 245 (1979).

"The American Humane Association's latest figures, which are from 1984, indicate that 200,000 cases of child sexual abuse were reported that year." B. Dziech & C. Schudson, *On Trial America's Courts And Their Treatment of Sexually Abused Children* 1 (1989).

"The point on which experts agree is that child sexual abuse is one of the most underreported of all crimes. Fewer than half of the respondents to the *Los Angeles Times* poll told a close friend or relative about their victimization within a year, and only 3 percent reported the incident to legal authorities or public agencies. This statistic is similar to Russell's findings that only 2 percent of intrafamilial and 6 percent of the extrafamilial incidents were reported to the police." *Id.* at 2.

"Victims themselves unknowingly aid in society's denial. Most disclose the incidents slowly and reluctantly over a period of weeks, months, or even years. Some live all of their lives without admitting to anyone what happened to them. Of former victims responding to the *Times* poll, 42 percent replied they told someone within a year, 21 percent said they waited more than a year, and 36 percent reported that they had told no one until asked by the interviewer. This response is indicative of the process that psychiatrist Roland Summit, after thousands of first-hand observations and consultations with professionals dealing with victims, described as the 'child sexual abuse accommodation syn-

the chance of a successful prosecution[2] is remote. The plight of a child rape or sexual assault victim has been described by The Supreme Judicial Court of Massachusetts in *Globe Newspaper Co.* v. *Superior Court*, 379 Mass. 846, 401 N.E.2d 360 (1980):

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drome.' *Id.* at 3.

Sexual abuse is under-reported. Melton, "Children's Testimony in Cases of Alleged Sexual Abuse", 8 *Advances Dev. & Behav. Pediatrics* 181-183 (1987).

According to the Federal Bureau of Investigation "only one in five of all sexual assaults are reported, and where children are involved, incidents are usually reported only when hospitals, schools or social agencies become involved." Collins, "Studies Find Sexual Abuse of Children Is Widespread," N.Y. Times, May 13, 1982, at C1, Col. 1, C10, Col. 1.

In short, statistics on reported cases of sexual assault understate the problem. Either the child does not report the incident, *see* National Center on Child Abuse and Neglect, "Child Sex Abuse: Incest, Assault and Sexual Exploitation" (1981); Landis, "Experiences of 500 Children with Adult Sexual Deviation," *30 Psychiatric Q. Supp.* 91, 99 (1956), or the parents refuse to go to the authorities, *see* Collins, "Studies Find Sexual Abuse of Children Is Widespread," N.Y. Times, May 13, 1982, at C10, Cols. 5-6.

[2] At least one study has reported that less than one percent of the offenders are ever imprisoned. N.Y. Times, May 13, 1982, at C10, Col. 5. That study compared the number of offenses committed by patients in a sexual behavior clinic. It concluded that in only 1 of 250 cases was the molester imprisoned. *Id.*

Only 50% of the sex offenders (238 men) in the Sexual Behavior Clinic at the New York State Psychiatric Institute had ever spent time in jail. These men had committed a total of 16,666 acts of child molestation, an average of 68.3 molestations per offender. N.Y. Times, May 13, 1982, at C1, Col. 1, C10, Col. 1.

"Comfortable in its ignorance, the public can avoid the challenge of Suzanne Sgroi, whose *Handbook of Clinical Intervention in Child Sexual Abuse* is a classic in its field. Sgroi reminds us that 'we tolerate sexual abuse of children in our society because we continue to process cases through an adversary system that is overwhelmingly weighted against the child victim at virtually every level.'" B. Dziech & C. Schudson, *On Trial America's Courts And Their Treatment of Sexually Abused Children* 5-6 (1989).

"The rape victim's ordeal in court has been well documented. It has been said that '[t]he court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself.' In fact, the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system. A rape victim who anticipates humiliation or embarrassment may choose not to come forward at all, or, if she comes forward, may abandon her participation midway through the case. Even if she continues to participate in the criminal process, she may become so distressed that she cannot testify effectively.

This is especially true for the child victim of rape." *Id.* at 858-859, 401 N.E. 2d at 368-369 (emphasis added).

Also see *Globe Newspaper Co.* v. *Superior Court*, 383 Mass. 838, 423 N.E. 2d 773 (1981), *rev'd*, 457 U.S. 596 (1982):

"To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial." *Id.* at 849, 423 N.E. 2d at 780.

In short, while the sexual assault itself is emotionally damaging, the ordeal of bringing criminal charges can compound the damage. Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 *Wayne L. Rev.* 977, 984 (1969); *see* discussion at notes 1 and 2, *supra*.

An important factor responsible for under-reporting is the post-attack treatment of the victim by the judicial process itself. Many parents, realizing how grueling the criminal process can be, fail to report sexual assaults in order

to protect their children from courtroom trauma.[3] J. MacDonald, *Rape Offenders and Their Victims* at 128 (1971).

"[A]lthough research in this area is still in its early stage, studies of children who have testified in court indicate that such testimony is associated with increased behavioral disturbance in children." *Coy*, 487 U.S. at ___, 108 S.Ct. at 2808 (citation omitted).

If the prosecutor does decide to go ahead with the case, the victim usually must testify at a preliminary hearing, which can take a serious emotional toll on a child. The victim is often frightened at having to face the assailant again, and may be embarrassed when required to repeat the story of the attack in a public setting. *See generally* T. McCahill, L. Meyer, & A. Fischman, *The Aftermath of Rape* 170 (1979) and L. Holmstrom & A. Burgess, *The Victim of Rape* 226 (1978).

Like the preliminary hearing, the trial itself creates fear and stress for the child witness. One study of rape victims admitted to the Boston City Hospital emergency wards in 1972 and 1973 concludes:

"Overwhelmingly, both adult and *young* victims found court an *extremely stressful experience*. The features they found most upsetting (judged by the frequency with which they mentioned them) were the *cross-examination* by the defense lawyer, the *confrontation* between the accused and accuser, and the *public setting*. They also found it difficult to listen to the defendant's version of what happened and were upset when informed belatedly about the *length* of the court process." L. Holmstrom & A. Burgess, *The Victim of Rape* 222 (1978). (emphasis added).

One researcher, investigating what troubled witnesses about the criminal justice system, found that:

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[3] Shortly after testifying in the same manner as an adult, one of the children who was represented by one of the writers of this brief committed suicide.

> "the most frequently mentioned fear was facing the defendant. That experience is frightening . . . to a child who does not understand the reason for confrontation. [T]hat participation and experience of being in close proximity to the defendant can be overwhelming."

D. Whitcomb, E. Shapiro and L. Stellwang, "When the Victim is a Child; Issues for Judges and Prosecutors," National Institute of Justice, 17-18 (1985).

Consistent with the above discussed studies, there were specific findings in the instant case, by the expert witnesses, concerning each of the children's inability to testify.[4] The findings were similar to those required for proof of an adult witness's inability to testify, *see Warren* v. *United States*, 436 A.2d 821 (D.C. App. 1981) and similar

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[4] Mary Burke, a treating child therapist with the Howard County Sexual Assault Center, testified that it would be difficult or impossible for the victim Brooke Etze to sit in the same room with Sandra Craig, and that the fear and anxiety would manifest itself by disruption in her breathing and that she would curl up in a ball and be unable to proceed. (E.75, 76,80,85). Ms. Burke, also testified that Justin Peeples, age five, another child victim of Craig, "would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure." (E.77). According to Ms. Burke, in order to avoid impairing Justin's ability to communicate and to maximize the opportunity of adducing the child's testimony, it would be necessary "to remove the threatening agent which he perceives as Mrs. Craig." (E.78). Ms. Burke also testified that Jessie Sue Smith age four, in light of threats made by Mrs. Craig, would be unable to testify in front of Ms. Craig. Dr. Gladys Sweeney testified that the fourth child witness, Drew Woodbury age five, exhibited extremely regressive behavior when talking about Craig's sexual abuse (E.95-99) and opined that Drew's "ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig." (E.94). Hence, expert opinion established that all four child witnesses would experience "severe emotional distress' stemming from the presence of the defendant during their attempt to testify. Implicit in the above testimony by the therapists who examined four of Craig's victims is the likelihood that each of the children might break down if forced to confront Craig face-to-face and thereafter become incapable of testifying even via one-way closed circuit television.

to what has been required to establish a child's inability to testify, *see People* v. *Stritzinger*, 34 Cal. 2d. 505, 194 Cal.Rptr. 431, 668 P.2d 738 (1983); Comment, "LB90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses," 68 *Neb. L. Rev.* 372, 407 (1989); J. Myers, *Child Witness Law and Practice*, § 5.27 at 311 (1987) (collecting cases).

That the child's fear of testifying in the presence of the defendant may be compounded by testifying in an imposing courtroom filled with strangers is irrelevant. As long as the presence of the defendant is a significant factor in rendering the child mute, there is no reason why it need be the sole factor. *See Kentucky* v. *Stincer*, 482 U.S. 730 (1987) (no right to confrontation at a competency hearing).

The Maryland State Legislature had ample support in respectable current research to conclude that: 1) face-to-face confrontation has the potential to cause serious emotional distress in young children, sometimes rendering children unable to reasonably communicate, 2) that the prospects of emotional distress and inability to testify face-to-face dissuade children, their families and the state from pursuing justice for child victims in the criminal process, 3) that actual attempts to testify face-to-face need not be made in order for a judge to determine the inability of an individual to reasonably communicate because of that severe emotional distress, and 4) that testifying by closed circuit television, not preceded by a paralyzing preliminary confrontation, would lessen the trauma faced by child victims who attempt to testify and encourage those victims who in the past have not come forward, to pursue justice in the criminal courts, serving the general protection of children.

There is no reason based on current knowledge in the field for this Court to second guess these legislative findings of fact. The Amici urge this Court to determine that these legislative findings establish the requisite level of necessity to legitimate the use of closed circuit television

pursuant to the process enacted by the legislature of Maryland.

C. The Statutory Condition That A Child Be Found Unable to Reasonably Communicate Satisfies The Unavailability Requirement If Such A Requirement Is Imposed By This Court.

1. The Confrontation Clause Does Not Demand A Showing of a Child's Unavailability As A Precondition To the Admission of Testimony Taken By Closed Circuit Television and Subject to Contemporaneous Cross-Examination.

Closed-Circuit television testimony is reliable, subject to contemporaneous cross-examination, and permits the fact-finder to view the demeanor of the witness. Only reliability, not unavailability, is the pre-requisite to the admission of many forms of hearsay. Requiring unavailability does nothing to promote reliability which is instead determined by the totality of the circumstances.

In *State* v. *Roy*, 214 Neb. 204, 333 N.W. 2d 398 (1983), the Nebraska Supreme Court stated that the Confrontation Clause is not violated where the statement admitted into evidence has sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. The court stated: "[T]he mission of the confrontation clause is to advance practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 207, 333 N.W. 2d at 401.

In *Roy*, the court affirmed the defendant's conviction of first-degree sexual assault upon his 2-year-oid stepdaughter. The court found that admission of an excited utterance by the child was permissible. It concluded that the age of the victim, her battered physical condition, the nature of the event, and the child's fear of additional injury (i.e. the totality of circumstances) provided a sufficient basis of reliability for the child's statement to qualify as an acceptable exception to the hearsay rule.

What is pertinent to the admission of many forms of children's hearsay statements is not whether or not the child could testify face-to-face with the accused but instead whether the statement is reliable based on the totality of the circumstances, a multi-factored test. *See, e.g., State* v. *Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987) (substance of statement corroborated by other evidence, spontaneity, consistent statements and statement elicited by questioning); *Morgan* v. *Foretich*, 846 F.2d 941 (4th Cir. 1988) (substance of statement corroborated by other evidence, spontaneity, statement indicates unusual knowledge of sexual acts or anatomy); *State* v. *Conklin*, 444 N.W. 2d 268, 276 (Minn. 1989) (spontaneity, lack of incentive of adults to fabricate allegations); *State* v. *Kuone*, 243 Kan. 218, 757 P.2d 289, 292 (1988) (consistent statements, lack of motive to fabricate); and *State* v. *Sorenson*, 143 Wis. 2d 226, 421 N.W. 2d 77, 85, 87 (1988) (statement indicates unusual knowledge of sexual acts or anatomy, use of terminology to describe sexual abuse that one would expect from a child of similar age, and accused had opportunity to commit act).

Moreover, under procedures like the Maryland procedure there is the additional safeguard that the child's testimony is subject to cross-examination. *See, e.g., Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) ". . . that a primary interest secured by it [the confrontation clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."

a. A State May Curtail Face-to-Face Confrontation Upon a Showing That A Child Would Endure Severe Trauma In Testifying Effectively.

A substantial number of pre- and post-*Coy* state court decisions hold that confrontation can be curtailed after a sufficient showing of trauma. This showing is somewhat less than that trauma which would render the child psychologically unavailable. *See Glendening* v. *State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 109 S. Ct. 3219 (1989); *Brady*

v. *State*, 540 N.E.2d 59 (Ind. App. 1989); *State* v. *Hoversten*, 437 N.W.2d 240 (Iowa) *cert. denied*, 110 S.Ct. 212 (1989); *In re J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State* v. *Chisholm*, 245 Kan. 145, ___, 777 P.2d 753, 758-59 (1989) (*Coy* does not "require the trial court to specifically find that the child's trauma is so great the child cannot reasonably communicate and therefore is unavailable as a witness"); *State* v. *Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989); *State* v. *Albert*, 13 Kan. App.2d 671, 778 P.2d 386 (1989); *State* v. *Thomas*, 150 Wis. 2d 374, 442 N.W.2d 10 (1989). These cases reflect the state's compelling interest in protecting capable child witnesses from undue harm.

Analyzing Craig's Confrontation Clause challenge in the light of *Coy*, the Court of Special Appeals of Maryland emphasized the State's interest in protecting children from trauma:

> "[T]he State has an interest in protecting children generally from trauma, especially trauma that would result from the deliberate action of the State itself. Keeping in mind the threshold requirements in § 9-102, what is to be gained from forcing a child-victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child rather than any meaningful evidence—*inculpatory* or *exculpatory*." *Craig* v. *State*, 76 Md. App. 250, ___, 544 A.2d 784, 800 (Md. App. 1988).

In comparison to adults, children run a greater risk of experiencing negative effects from testifying in court because they are less likely than adults to have the cognitive skills necessary to organize the experience. *See Ward*, "The Child as Witness," 4 *Family Advocate* 14 (Sept. 1982) and Melton, "Children's Competency to Testify," 5 *Law and Human Behavior* 73, 110 (1981). Also see, Part B *supra*. It is undoubtedly true that many children are traumatized by involvement in the legal system, and in particular by testifying before the defendant. *See Commonwealth* v. *Amirault*, 404 Mass. 221, ___, 535 N.E.2d 193, 206 (1989) (child's therapist "testified that the child became more

anxious, concerned, and aggressive as he prepared to testify in court." The boy was reluctant to talk about his abuse at day care, and "reacted to the topic by holding his knees up, covering his eyes, clenching his fists, and grinding his teeth") and *State* v. *Albert*, 13 Kan. App. 671, 778 P.2d 386 (1989) (child's therapist of six months opined that testifying would be very difficult for child, who had a serious ulcer and who cried every time the subject of testifying was brought up).

Unavailability pertains to necessity and therefore should not be required for admissibility of testimony when there is contemporaneous cross-examination and other sufficient indicia of reliability and placing the witness before the accused is precisely the harmful situation to be avoided. *See, e.g., United States* v. *Inadi*, 475 U.S. 387 (1986).

> "*Ohio* v. *Roberts* did not stand for the radical proposition that no out-of-court statement can be introduced . . . without a showing that the declarant is unavailable.' In the Court's analysis [in *Inadi*], such an interpretation adds nothing to the determination of the truth in a case, which is the object of the confrontation clause." Dziech & Schudson, *supra* n.1 at 138.

..mici concede that the Maryland statute does not permit dispensing with face-to-face confrontation when a child who will be severely traumatized can, nevertheless, effectively testify. Amici pray that this Court, in upholding the Maryland statute, nonetheless articulate Confrontation Clause principles which validate curtailing face-to-face confrontation upon individualized showings that a child can testify but only at great personal expense in terms of serious emotional or physical trauma. Such findings should not normally require a preliminary face-to-face confrontation demonstrating the very trauma the process is meant to obviate.

b. A State May Curtail Face-To-Face Confrontation When It Would Undermine The Trustworthiness Of The Child's Testimony.

This Court's decisions

> "... make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier' of fact [has] a satisfactory basis for evaluating the truth of [any out of court statement]". *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), quoting *California* v. *Green*, 399 U.S. 149, 161 (1979).

See Coy, 487 U.S. at ___, 108 S. Ct. at 2802, quoting *Kentucky* v. *Stincer*, 482 U.S. 730, 736 (1987) ("the right to face-to-face confrontation" [exists in part to] " 'ensur[e] the integrity of the fact-finding process' ". "Thus, the priority accorded the right to face-to-face confrontation in *Coy* turned not on its intrinsic inviolability but rather on its functional value in enhancing the fact-finding process of criminal trials." *State* v. *Bonello*, 210 Conn. 51, 554 A.2d 277, 282, *cert. denied*, 109 S. Ct. 2103 (1989). *See also Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980).

As was recently discussed by the Georgia Court of Appeals, a face-to-face confrontation between the defendant and the child witness more likely than not will inhibit the revelation of the truth:

> "In many cases, to require eye-to-eye contact between the victim and the appellant would not only be intimidating and very possibly exacerbate the damage done them, but it also serves no meaningful purpose in the search for truth." *Ortiz* v. *State*, 188 Ga. App. 532, 374 S.E.2d 92, 95 (1988).

See Commonwealth v. *Ludwig*, 531 A.2d 459, 467 (Pa. Super. 1987), *app. gr.*, 518 Pa. 617, 541 A.2d 744 (1988) (Tamilia, concurring):

> "It requires no expert testimony to establish that a child in an adult courtroom, subject to the most cre-

> ative and stressful means of getting to the truth, will react not as an adult but as a child. *While this procedure is calculated to arrive at the truth with an adult, a child can only be expected to respond with emotional and physical reactions derived from terror.* For a child not to "freeze" is unusual and to present a clear unequivocal statement of the occurrence is even more unusual. If the constitution may be interpreted broadly enough to deny them the right of adults for their protection and in their best interests (denial of jury trial, denial of emancipation, right to contract, etc.), it can also be extended to soften (not eliminate) the harshness of their testifying in court for the same reason the juvenile acts, dating from 1898, universally adopted throughout the country, are testimony to this recognition. To do otherwise is to provide a defendant charged with sexual or other child abuse with an overwhelming advantage (inconsistent) with equal justice." *Id.* at 467 (emphasis added).

See also State v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984) in which a recognized expert in forensic psychology testified:

> "[T]he victim has the capacity to testify truthfully. It was [the doctor's] opinion, however, that *avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony.* He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child. . . . The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony." *Id.* at 1332. (emphasis added).

Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very existence of the

child's testimony. Hill and Hill, "Videotaping Children's Testimony: A Empirical View," 85 *Mich. L. Rev.* 809, 820 (1987).

As Justice Blackmun noted in his dissent in *Coy* v. *Iowa*, 487 U.S. at ___, 108 S.Ct. at 874, the use of protective measures can actually enhance the reliability of the testimony of child sex abuse victims. Also see, B. Dziech & C. Schudson, *On Trial America's Courts and Their Treatment of Sexually Abused Children* (1989):

> "In courtrooms witnesses are judged on the basis of juries' perception of qualities like truthfulness, trustworthiness, certainty, and confidence. It seldom occurs to most people that some hardened criminals or pathological liars may be more likely than innocent people to appear honest, trustworthy, and self-confident. Children are not likely to look directly or long at a strange judge or a hostile attorney because they are frightened and because they have been instructed from infancy to avoid strangers. Yet few jurors consider that children's avoidance reactions may not be dishonesty but rather shyness, fear, and other predictable qualities that are heightened by their inexperience and impotence in the legal system." *Id.* at 66.

. . . .

A child intimidated into silence by the traditional court process is a far greater danger to an innocent defendant than is one who communicates confusion or untruth. Silence can be interpreted as fear of the defendant when it may, in reality, be reluctance of the child to be trapped in a lie. The best defense against false allegations by children is implementation of procedures that will increase their participation in the legal process. To establish that the innocent are being persecuted because of malicious stories from devious children, one must first allow the children to tell their stories; and if the telling is contingent upon puppets or laps or even a television camera, it is

preferable to little or no testimony at all." *Id.* at 18-19.

Thus, in addition to protecting the child witness from emotional trauma, the procedures utilized by the trial court furthers a second important interest—that of enhancing the truth-determining process of criminal trials. *See Wildermuth* v. *State*, 530 A.2d 275, 283-284 (Md. 1987); *State* v. *Tafoya*, 108 N.M. 1, 765 P.2d 1183, 1186 (1988), *cert. denied*, 109 S.Ct. 1572 (1989); and *State* v. *Bonello*, 210 Conn. 51, 554 A.2d at 281-282. Indeed, lack of trustworthiness (as opposed to unavailability of the witness or trauma to the witness) is the test for invoking the Connecticut videotaping statute. *See, e.g., State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245, 1255 (1987), *cert. denied*, 484 U.S. 1061 (1988) ("the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question.")

Of course, the younger the child, the more likely it is that confrontation with the accused will inhibit, rather than foster, the truthfulness of the child's testimony, especially since commonly children are told that if they tell, their parents won't love them anymore, their parents will die, they will be killed, or they will get in trouble. *See, e.g., State* v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d at 1332.

Amici concede that there was no finding in the instant case regarding the use of closed circuit television to enhance the truthfulness of given testimony. Indeed the Maryland statute does not seem to contemplate such an inquiry. Amici pray that this Court, in upholding the Maryland statute, articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon an individualized showing that it would enhance the truthfinding process. Such findings should not normally require a preliminary face-to-face confrontation to demonstrate the distortion of the truthfinding process.

c. The Accused's Threat to the Child Witness Represents a Forfeiture or Waiver of the Right to Face-to-Face Confrontation.

The accused's threatening conduct would justify dispensing with face-to-face confrontation even when a child could effectively testify face-to-face with the accused but only with experiencing severe fear associated with the threatening behavior. Where a defendant has promised severe retribution for answering questions about what the defendant did to the child, the defendant has forfeited his right to face-to-face confrontation. *See United States* v. *Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (waiver of confrontation by threatening or intimidating witnesses; "the Sixth Amendment does not act as a shield to protect the accused from his own misconduct or chicanery").[5] It is already a well-established rule of law that a defendant waives his right to confrontation should he cause a witness to be unavailable or incapable of testifying: "[a]ny other result would mock the very system of justice the Confrontation Clause was designed to protect." *United States* v. *Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). *See also United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States* v. *Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *Black* v. *Woods*, 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981); *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245, 1252-53 (1987), *cert. denied*, 484 U.S. 1081 (1988); *State* v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

The Amici ask that this rule apply to situations in which the accused's threatening conduct is such that face-to-face

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[5] Waiver of the right of confrontation is also found in a number of other situations. *See, e.g.*, *Williams* v. *Oklahoma*, 358 U.S. 576 (1959) (waived by a defendant stipulating to the admission of certain evidence); *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (a defendant who pleads guilty waives his right to confrontation); *Illinois* v. *Allen*, 397 U.S. 337 (1970) (engaging in disruptive behavior in the courtroom as waiver).

confrontation during testimony would unduly exacerbate the child's fear. The importance of the Court's consideration of the dynamics of a defendant's relationship to a child witness was observed by the dissenting justices of the Georgia Court of Appeals in *Glisson* v. *State*, 188 Ga. App. 152, 372 S.E.2d 462 (1988):

> "The victim, often the only witness able to establish the evidence necessary for a conviction may be intimidated into silence out of fear of reprisal. . . . Conviction for these reprehensible offenses should not be thwarted by the accused's emotional and psychological control over the victim. The offense in these cases, as in any other crime, is not just against the victim but against the laws, good order, peace and dignity of the state. When reliable evidence is available to sustain a conviction, it must not be excluded. Justice is blind, but not dumb." *Id.* at 462.

In explaining the basis for her opinion that "it would be very difficult if not impossible to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents," (E.75), Mary Burke, a child therapist with the Howard County Sexual Assault Center, who had conducted twenty therapy sessions with Brooke each lasting one to one and one-half hours (E.74) said that Brooke perceives "that she was threatened by Mrs. Craig and that she feels that her life is in jeopardy and part of her family and the household pet." (E. 75-76). Ms. Burke also commented that Brooke "truly believes that those threats will be carried out against her." (E. 75). Similar findings were made concerning other child-victim-witnesses: Justin Peeples, age five, sees Mrs. Craig "as a threatening figure" (E.77) and Jessie Sue Smith, age four, perceives Craig as a threat to herself, her parents, and her siblings (E.80). She believes that Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. *Id.*

Here the therapists' testimony based on numerous therapy sessions establishes that the children feared serious reprisals from Mrs. Craig including fearing for their lives

and fully believed that Mrs. Craig was capable of carrying out these threats. Surely these children are entitled to the same protection given the adult government witness in *Carlson*.

The Amici concede that the trial court did not make a finding that Craig's threats created a forfeiture of face-to-face confrontation rights. This could have been and remains an alternative ground for upholding the trial court's dispensing with such confrontation. In the event this Court upholds the Maryland statute as written, Amici pray that this Court articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon individualized findings that an accused's threats to a child witness would cause the child to experience severe fear of harm or retribution if forced to testify in the accused's presence.

2. A Trauma Induced Inability to Testify Face-to-Face With The Accused Constitutes Unavailability for Confrontation Clause Purposes.

As indicated by *Coy*, the Supreme Court of the United States has said that while the Sixth Amendment reflects a preference for a face-to-face confrontation at trial, the preference is not absolute and inelastic. The Confrontation Clause of the United States Constitution does not preclude the use of hearsay evidence in criminal trials under circumstances which otherwise render such evidence reliable, *i.e.*, where it bears sufficient 'indicia of reliability.' *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (involving former testimony of unavailable witness). *See United States* v. *Inadi*, 475 U.S. 387 (1986) (statement of co-conspirator); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (statement of co-conspirator); *Mattox* v. *United States*, 156 U.S. 237, 242-244 (1895) (former testimony); *Williams* v. *Melton*, 733 F.2d 1492 (11th Cir. 1981), *cert. denied*, 469 U.S. 1073 (1984) (out-of-court statements of witnesses falling under *res gestae* exception); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (excited utterance); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) (statement of co-conspirator).

If the Court were to determine unavailability must be shown then unavailability should not be given the strictest literal meaning, but instead be equated with inability to testify because of suffering significant psychological or physical harm. For example, the 1972 United States Supreme Court case of *Mancusi* v. *Stubbs*, 408 U.S. 204, 206 (1972) held that if a witness is unavailable to testify, it is not a denial of the right to confrontation to allow into evidence prior recorded testimony of a witness where the defendant has had an adequate opportunity to cross-examine the witness. Hence, admission of former testimony has been upheld over a challenge of unconstitutionality in a variety of contexts including: death of the witness, *People* v. *Behm*, 49 Ill. App.3d 574, 580, 364 N.E.2d 636, 641 (1977), prosecution's inability to locate the witness, *People* v. *Contreras*, 57 Cal. App.3d 816, 820, 129 Cal. Rptr. 397, 400 (1976); *People* v. *Fink*, 37 Colo. App. 512, 552 P.2d 529, 531 (1976), rev'd, 194 Colo. 516, 574 P.2d 81 (1978); alleged loss of memory of the witness, *State* v. *Thomas*, 110 Ariz. 120, 126, 515 P.2d 865, 870 (1973), witness's refusal to testify on grounds of fear for the safety of his person and of his family, *People* v. *Rojas*, 44 Cal. App. 3d 978, 119 Cal. Rptr. 144 (1975), witness's pregnancy, *Lamb* v. *State*, 560 P.2d 583 (Okla. Crim. 1977), and psychological unavailability of the witness, *People* v. *Gomez*, 26 Cal. App.3d 225, 231, 103 Cal. Rptr. 80, 84 (1972).

Similarly, two federal circuit court cases have found that the invocation of the fifth amendment privilege against self-incrimination constitutes sufficient unavailability. *Phillips* v. *Wyrick*, 558 F.2d 489, 494 (8th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978); *United States* v. *Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). In addition, Section 804(a)(1) of the Federal Rules of Evidence defines "unavailability" as including the situation where the declarant is exempted from testifying on the ground of privilege.

Flexibility in the unavailability test under the Confrontation Clause is also supported by the judicial recognition that the legislature is free to provide for depositions to

perpetuate testimony without fear of infringing on the defendant's confrontation rights. For example, the Supreme Court of Appeals of Virginia in *Setliff* v. *Commonwealth*, 162 Va. 805, 173 S.E. 517 (1934) found Virginia's statute, which provides for a deposition to be read into evidence in rape cases, to be well within constitutional limits. *Accord United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) which upheld the constitutionality of the federal criminal deposition statute, Fed. R. Crim. P. 15, 18 U.S.C. §3503 (1976).

Moreover, that the hearsay rule is not violated by admitting the out-of-court statement of a psychologically unavailable witness is supported by *Commonwealth* v. *Stasko*, 471 Pa. 373, 370 A.2d 350 (1977). In *Stasko*, the Supreme Court of Pennsylvania held that, under the circumstances, the trial court properly permitted the prosecution to take and use at a trial a videotaped deposition of an eyewitness whose health did not permit a court appearance. The witness saw a co-employee being murdered in the parking lot after work. She had had numerous abdominal operations for regional ileitis and ulcerative colitis and her doctor thought that the emotional strain of her appearance would gravely aggravate her condition.

Creating a new category of unavailability (psychological unavailability), for which the legislature finds compelling policy reasons in light of the emotional vulnerability of child witnesses, will not violate the Confrontation Clause. Two recent federal cases support this assertion. First, in *United States* v. *Nick*, 604 F.2d 1199 (9th Cir. 1979), the defendant unsuccessfully appealed his conviction of sexual assault on a 2-year-old child alleging that the trial court erred in admitting, over hearsay and Confrontation Clause objections, damaging statements of the victim reported in the testimony of the child's mother and his physician. Second, in *United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the trial court's admission of the 9-year-old assault victim's statement to her doctor and to the police officer was upheld. The Eighth Circuit court reasoned:

> "It has been recognized, however, that even though a declarant is available to testify, the confrontation clause protection may be called into question because the declarant is too young to be subjected to a thorough cross-examination as envisaged by the constitution .... This principle was also recognized in *California* v. *Green* where the court remanded the case for a determination of whether 'the nature of the opportunity to cross-examine' was dispositive of the confrontation issue. *These cases recognize a special type of "unavailability" for purposes of the confrontation clause* .... Nevertheless, assuming arguendo that Lucy was *unavailable* in the sense suggested by the *Nick* court, we conclude that the confrontation clause was not violated ...." *Id.* at 87 (citations omitted) (emphasis added).

Thus, the Eighth and Ninth Circuit court opinions relied upon special notions of unavailability to admit out-of-court statements by a young child into evidence.

Moreover, if a witness may be rendered unavailable by mere lack of memory, *see, e.g.*, Fed. R. Evid. 804, Advisory Committee's Note, at 144 (West 1975) or by simple refusal to testify, *see, e.g.*, *Johnson* v. *People*, 152 Colo. 586, 384 P.2d 454 (1963), *cert. denied*, 376 U.S. 922 (1964); *People* v. *Pickett*, 339 Mich. 294, 63 N.W. 2d 681 (1954), *cert. denied* 349 U.S. 937 (1955), in situations for which there is no public policy reason for protecting the witness, it seems inappropriate to bar the child's cross-examined statements where there are strong policy reasons for allowing it into evidence.

A growing number of pre- and post-*Coy* state court decisions hold that confrontation may be withheld when a face-to-face encounter would render the child unavailable as a witness. *See State* v. *Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989); *State* v. *Twist*, 528 A.2d 1250 (Me. 1987); *State* v. *Conklin*, 444 N.W.2d 268 (Minn. 1989); and *State* v. *Taylor*, 562 A.2d 445 (R.I. 1989).

In *Craig* there was sufficient expert testimony that the four child witnesses would be psychologically traumatized by the presence of the defendant rendering them unable to reasonably communicate. See footnote 4, *supra*. Therefore, each of the children were unavailable as the defendant's presence, according to the expert testimony, was a significant factor in the experts' opinion that each of the children would be rendered unable to reasonably communicate. Indeed, while it is asking too much as criteria for admissibility to establish unavailability, the Maryland Court does determine that there is "psychological unavailability." *Craig*, 560 A.2d at 1126.

CONCLUSION

By erroneously and illogically requiring the child to be exposed to the very psychological and physical trauma that Section 9-102 was intended to minimize, the Maryland Court of Appeals has defeated its legislature's goal of protecting children and the criminal process's mission of ferreting out the truth. The Maryland Court's interpretation of Section 9-102 should be reversed to the extent that it requires face-to-face confrontation prior to utilizing Section 9-102. Expert or lay testimony is sufficient. Likewise, the court's limitation of the reason behind the child's inability to communicate to solely the fear of the defendant must be reversed.

Like the apple in "Snow White and the Seven Dwarfs" the current court procedures promise health but practice harm. Only legislation, such as Section 9-102, can end this senseless system and protect vulnerable young children. The restrictive interpretation given Section 9-102 by the Maryland Court below, which defeats the state Legislature's purpose of child protection, should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Provisions For Use Of Closed Circuit Television, One-Way Screens or Two-Way Mirrors

1. Alabama: Ala. Code Sec. 15-25-3 (Supp. 1988)
2. Alaska: Alaska Stat. Sec. 12.45.046 (Supp. 1988)
3. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
4. California: Cal. Penal Code Sec. 1347 (West Supp. 1989)
5. Connecticut: Conn. Gen. Stat. Sec. 54-869 (West Supp. 1989)
6. Florida: Fla. Stat. Ann. Sec. 92.53 (West Supp. 1989)
7. Georgia: Ga. Code Ann. Sec. 81-1006.2 (Supp. 1989)
8. Hawaii: Haw. R. Evid. 616
9. Indiana: Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989)
10. Iowa: Iowa Code Ann. Sec. 910.14 (West Supp. 1989)
11. Kansas: Kan. Stat. Ann. Sec. 2203434 (1988)
12. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
13. Louisiana: La. Rev. Stat. Ann. Sec. 15:283 (West Supp. 1989)
14. Maryland: Md. Cts. & Jud. Proc. Code Ann. Sec 9-102 (Supp. 1988)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278, Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)
17. Mississippi: Miss. Code Ann. Sec. 13-1-405 (Supp. 1987)
18. New Jersey: N.J. Rev. Stat. Sec. 2A:84A-32.4 (West Supp. 1989)

19. New York: N.Y. Crim. Proc. Law Secs. 65.00-.03 (McKinney Supp. 1989)
20. Ohio: Ohio Rev. Code Ann. Sec. 2907.41 (Supp. 1987)
21. Oklahoma: Okla. Stat. Ann. tit. 22 Sec. 753 (West. Supp. 1989)
22. Pennsylvania: Pa. Cons. Stat. Ann. tit. 42 Sec. 5985 (Purdon Supp. 1989)
23. Rhode Island: R.I. Gen. Laws 11-37-13.2 (Supp. 1988)
24. Texas: Tex. Crim. Proc. Ann. art. 38.071 (Vernon Supp. 1989)
25. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
26. Vermont: Vt. R. Evid. 807

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2. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
3. Arkansas: Ark. Code Ann. Sec. 16-44-203 (1987)
4. California: Cal. Penal Code Sec. 1346 (West Supp. 1989)
5. Colorado: Col. Rev. Stat. Sec. 18-3-413 (1986)
6. Connecticut: Conn. Gen. Stat. Ann. Sec. 54-869 (West Supp. 1989)
7. Delaware: Del. Code Ann. tit. 11, Sec. 3511 (1987)
8. Florida: Fla. Stat. Sec. 92.53 (West Supp. 1989)
9. Hawaii: Haw. R. Evid. 616
10. Illinois: Ill. Ann. Stat. ch. 38, para. 106A-2 (Smith Hurd Supp. 1989)
11. Indiana: Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989)
12. Iowa: Iowa Code Ann. Sec. 910.14 (West Supp. 1989)

13. Kansas: Kan. Stat. Ann. Sec. 22-3434 (1988)
14. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278 Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)
17. Mississippi: Miss. Code Ann. Sec. 13-1-407 (Supp. 1987)
18. Missouri: Mo. Ann Stat. Secs. 491.680-687 (Vernon Supp. 1989)
19. Montana: Mont. Code Ann. Secs. 46-15-401 to -403 (1987)
20. Nevada: Nev. Rev. Stat. Ann. Secs. 174.227 and 174.229 (1986)
21. New Hampshire: N.H. Rev. Stat. Ann. Sec. 517.13-a (Supp. 1988)
22. New Mexico: N.M. Stat. Ann. Sec. 30-9-17 (1986)
23. Ohio: Ohio Rev. Code Ann. Sec. 2907-41 (Baldwin Supp. 1987)
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27. South Carolina: S.C. Code Ann. Sec. 16-3-1530(G) (1984)
28. South Dakota: S.D. Code Ann. Sec. 23A-12-9 (1988)
29. Tennessee: Tenn. Code Ann. Sec. 24-7-116 (Supp. 1988)

30. Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989)
31. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
32. Vermont: Vt. R. Evid. 807
33. Wisconsin: Wis. Stat. Sec. 967-04(7)(a) (Supp 1988)
34. Wyoming: Wyo. Stat. Sec. 7-11-408 (1987)

No. 89-478

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ Of Certiorari To The Court of Appeals Of Maryland

BRIEF OF AMICUS CURIAE, THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES TO FILE AMICUS CURIAE BRIEF

Amicus Curiae, The Appellate Committee of the California District Attorney's Association, is filing this brief with the written consent of all parties to the above-entitled case. The consent has previously been lodged with the Clerk of Court. (See: Rule 37.3; Rules of the Supreme Court of the United States)

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of the State of California. It has been established in order to utilize and coordinate the resources of the District Attorneys throughout the state for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major impact upon the prosecution of criminal cases. Upon review of the instant matter – which raises the question of the competing states interests in protecting a child witness from the trauma of face-to-face testimony before a defendant and the defendant's right of confrontation at trial – the committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California. It is for this reason that the committee has filed an Amicus Curiae brief herein.

Amicus, The Appellate Committee of the California District Attorney's Association, join in the views expressed by petitioner, State of Maryland, and the other

Amici in support of petitioner. This Amicus, however, chooses to present a narrowly focused analysis of the case.

The protection of the child witness is an important public policy that demands that procedural devices be utilized to protect the child witness at all stages of the criminal process. A threshold question in any analysis of this important public policy, with respect to the defendant's right to confrontation, is whether the confrontation clause is even implicated. This court's decision in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), indicates that procedures such as that used by the State of California – two way closed circuit television – satisfies the defendant's right to confrontation of witnesses without raising issues under the confrontation clause.

Amicus will demonstrate that the Court of Appeals of Maryland erred in concluding that the confrontation clause requires a face-to-face physical confrontation between the defendant and his child accuser. Amicus offers the procedure adopted by the State of California as an example of a method that satisfies the interests of both the accuser and the accused.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported as *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

STATEMENT OF THE CASE

This case arose from an indictment handed down by the Howard County, Maryland, Grand Jury, charging respondent with various offenses involving the sexual abuse of children. Seeking to avoid the trauma to the children necessarily involved in testifying in the direct physical presence of the defendant, the court utilized a Maryland statute whereby the children testified via one-way closed circuit television.

Before utilizing this procedure, a special hearing was held to determine the effect on the children of testifying in the defendant's physical presence. The children did not testify during this hearing; instead the Court based its opinion on expert testimony. The children's testimony was elicited at trial by way of one-way closed circuit television. The jury convicted the respondent of all charges against her.

The Maryland Court of Appeals reversed the conviction. The Court held that the procedures used to determine how the child testified at trial violated the defendant's Sixth Amendment right of confrontation. The Court based its holding on the conclusion that the Sixth Amendment required testimony from the children in the direct physical presence of the defendant. This testimony could occur either at trial or at a pretrial hearing held to determine whether the child would be unable to "reasonably communicate" in the physical presence of the defendant because of the serious emotional distress on the children produced by the presence of the defendant. *Craig v. State*, 316 Md. 551, ___, 560 A.2d 1120, 1127 (1989).

Amicus, The Appellate Committee of the California District Attorney's Association, contends that the Maryland Court erred in requiring the children to be traumatized by testifying in the physical presence of the defendant in a hearing held expressly to avoid that trauma.

SUMMARY OF ARGUMENT

The Sixth Amendment to the United States Constitution provides for a right of confrontation of witnesses against a criminal defendant. An examination of this court's decision in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), demonstrates the necessity of a two-step analysis of the confrontation clause. Those two steps consist of first, whether a confrontation has occurred and second, if not, whether an exception exists excusing the lack of confrontation. Amicus addresses primarily the first of those two steps.

The Court below erred in setting forth too strict a definition of confrontation. The Sixth Amendment does not require that a child witness be traumatized by testifying in the physical presence of the accused in a hearing held expressly to avoid that trauma. Confrontation need not consist of an eyeball-to-eyeball direct physical contact. The use of two-way closed circuit television in eliciting the testimony of a child witness constitutes a confrontation. This method of testifying protects all the interests served by the Confrontation Clause.

ARGUMENT

I.

THE SIXTH AMENDMENT REQUIRES THAT IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO BE CONFRONTED WITH THE WITNESS AGAINST HIM

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " U.S. Const.Amend.VI. In prosecutions involving child sexual assault a conflict arises due to the public policy of protecting the child witness.

The Confrontation Clause advances the goal of seeking truth at trial "by insuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). In cases of child sexual assault the challenge is to seek the truth while at the same time protecting the child from unnecessary trauma. This trauma can arise from testifying in the physical presence of the accused about extremely personal and even degrading incidents of sexual assault.

Many states have adopted procedures which allow for the protection of the child witness.[1] California has

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[1] Alaska Stat. Sec. 12.45.046 (Supp.1988); Ariz. Rev. Stat. Ann. Sec. 13-4251 and 13-4253 (Supp.1988); Conn. Gen. Stat. Sec. 54-869 (West Supp.1989); Fla. Stat. Ann. Sec. 92.53 (West Supp.1989); Ga. Code Ann. Sec. 81-1006.2 (Supp.1989); Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp.1989); Kan. Stat. Ann. Sec. 22-3434 (1988); Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp.1989); Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102 (Supp.1988); Mo. Ann. Stat. Secs. 491.680(2) (Vernon Supp.1989); N.H. Rev. Stat. Ann. Sec. 517.13-a (Supp.1988); N.J.

(Continued on following page)

adopted a procedure whereby a child victim under the age of ten may testify via two-way closed circuit television. Cal.Pen.Code Section 1347. (Appendix A) The California Procedure avoids any Confrontation Clause issue by requiring that the alternate method of eliciting testimony from the child victim consist of two-way closed circuit television.

II.

THE CONFRONTATION CLAUSE IS NOT IMPLICATED BY A PROCEDURE BY WHICH A CHILD WITNESS TESTIFIES VIA TWO-WAY CLOSED CIRCUIT TELEVISION

While the decision of the Maryland Court of Appeals addresses many issues, Amicus chooses to examine only a portion of that court's analysis. The Maryland Court erred in presuming that the child must be traumatized by testifying in the physical presence of the accused before adopting a procedure designed to avoid traumatizing the child.

The Maryland Court held that before a court may utilize a procedure involving an alternative to testimony by the child in direct physical presence of the accused in the courtroom it must first hold a hearing featuring precisely such testimony. *Craig*, 316 Md. at ___, 560 A.2d at 1127. "[I]n the face of a confrontation challenge [The Maryland Statute] ordinarily cannot be invoked unless

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(Continued from previous page)

Rev. Stat. Sec. 2A:84A-32.4 (West Supp.1989); N.Y. Crim. Proc. Law Secs. 65.00-.30 (McKinney Supp.1989); Ohio Rev. Code Ann. Sec. 2907.41 (Supp.1987); Utah Code Ann Sec. 77-35-15.5 (Supp.1989); Vt. R. Evid. 807; Wis. Stat. Sec. 967.04(7)(a) (Supp. 1988)

the child witness initially is questioned . . . in the defendant's presence, and is found by the trial judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." *Id.* (citing *Wildermuth v. State*, 310 Md. 496, 523-24, 530 A.2d 275, 289 (1987)).

The Maryland Court defined "in the defendant's presence" as requiring "face-to-face confrontation with the defendant," *Id.* The Court further described this confrontation as "eyeball-to-eyeball," *Id.* Without such direct physical confrontation the court ruled the Sixth Amendment would necessarily be violated.

An examination of this Court's opinion in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), compels the conclusion that the Maryland Court construed the presence requirement far too strictly.

The Court in *Coy* left for another day whether any exceptions existed to the requirement of a face to face meeting between an accused and an accuser. *Id.*, at ___, 101 L.Ed.2d at 867. It is clear that the court's opinion, viewed in conjunction with Justice O'Connor's concurrence, establishes that the confrontation required by the Sixth Amendment need not be eyeball-to-eyeball as stated by the Maryland Court.

In her concurring opinion in *Coy*, Justice O'Connor stated, "Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony *in the presence of the defendant*." *Id.*, at ___, 101 L.Ed.2d at 868 (O'Connor, J. concurring) (emphasis added). Among the statutes cited by Justice O'Connor

was section 1347 of the California Penal Code (See Appendix A), which provides for testimony by two-way closed circuit television. The conclusion is inescapable that Justice O'Connor considered testimony via two-way closed circuit television to be "testimony in the presence of the defendant." *Id.*

Justice O'Connor's analysis continued, "Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use." *Id.* Therefore, Justice O'Connor provided a two-step analysis. First it is necessary to determine whether a defendant has been denied a confrontation. Only if there has been no confrontation must the court inquire into the availability of an exception.[2] The Maryland Court erred by construing too strictly the confrontation requirement as necessarily consisting of direct physical eyeball-to-eyeball contact. *Craig*, 316 Md. at ___, 560 A.2d at 1127. Confrontation via two-way closed circuit television fully satisfies the Sixth Amendment. It is therefore unnecessary to look for an exception.

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[2] Even if this court concludes that the Confrontation Clause was implicated in *Craig*, it should inquire into any exceptions that may exist. As Justice O'Connor noted, something other than personal confrontation would be permissible if necessary to further an important public policy, such as preventing trauma to child witnesses. "If a court makes a case-specific finding of necessity . . . our cases suggest that the strictures of the confrontation clause may give way to the compelling state interest of protecting child witnesses." *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 869-70 (O'Connor, J. concurring).

Nothing in Justice Scalia's Opinion for the court conflicts with this analysis. The "face-to-face presence" referred to in the Court's Opinion would appear to embrace the use of two-way closed circuit television. The Court's language indicates that the purpose of the clause is served where the witness testifies while looking at the defendant. *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 866. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant." *Id.* So long as the witness has the ability to do so, the Confrontation Clause is not implicated. This is precisely why Justice O'Connor and Justice White concurred in the Opinion. *Id.* at ___, 101 L.Ed.2d, at 870, (O'Connor, J. concurring).

III.

TESTIMONY VIA TWO-WAY CLOSED CIRCUIT TELEVISION SERVES ALL THE INTERESTS PROTECTED BY THE CONFRONTATION CLAUSE AND THEREFORE IS A SIXTH AMENDMENT CONFRONTATION

The conclusion of the Maryland Court of Appeal that the Confrontation Clause necessitates "eyeball-to-eyeball confrontation," *Craig*, 316 Md. at ___, 560 A.2d at 1127, errs because testimony via two-way closed circuit television serves all the interests protected by the Confrontation Clause. This court set out, in *California v. Green*, the interests protected by confrontation.

> Confrontation: (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth";

> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970).

The use of two-way closed circuit television satisfies each of those interests. *Coy* also observed that the Confrontation Clause furthers the interest of finding the truth by requiring that the defendant and the witness be able to view one another. *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 866. The use of two-way closed circuit television also satisfies these interests.

CONCLUSION

An examination of this court's decision in *Coy v. Iowa* in light of Justice O'Connor's concurring opinion demonstrates the necessity of a two-step analysis to the Confrontation Clause. The first step requires the court to determine whether a confrontation has taken place. The Maryland Court's opinion erred in setting forth a too strict definition of confrontation. This Court's decision in *Coy* compels the conclusion that testimony via two-way closed circuit television is confrontation.

DATED: March, 1990.

Respectfully submitted,

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APPENDIX A

California Penal Code section 1347 reads:

(a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other provision of law, the court in any criminal proceeding, upon written notice of the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 10 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom by means of two-way closed-circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear

and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

(3) The equipment available for use of two-way closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c)(1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other provision of law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(d) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the

reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of two-way closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue, or in any way influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved on video tape in addition to being stenographically recorded. The video tape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and his or her attorney during ordinary business hours. The video tape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any video tape which is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(e) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person designated pursuant to Section 868.5, a non-uniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or any of the facts of the case with the minor during this meeting.

(g) When the court orders the testimony of minor to be taken in another place outside the courtroom, nothing in this section shall prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose including the identification of the defendant or defendants as the court deems necessary.

(h) The examination shall be under oath, and the defendant's image shall be transmitted live to the witness via two-way contemporaneous closed-circuit television.

(i) Nothing in this section shall affect the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(j) The Judicial Council shall submit a report to the Legislature on or before January 1, 1988, summarizing the experience of courts which have used contemporaneous closed-circuit television pursuant to this section.

(k) The cost of examination by two-way contemporaneous closed-circuit television ordered pursuant to this section shall be borne by the court out of its existing budget. (Added by Stats.1985, c.43, section 1. Amended by Stats.1986, c.774, section 2; Stats.1987, c. 828, section 88.)

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v.

SANDRA ANN CRAIG,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE INSTITUTE FOR PSYCHOLOGICAL THERAPIES IN SUPPORT OF SANDRA ANN CRAIG, RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989
NO. 89-478

STATE OF MARYLAND,
Petitioner,

V.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Ralph Underwager, Ph.D. and Holida Wakefield, M.A., a partnership during business as The Institute for Psychological Therapies (IPT) hereby move for leave to file the attached brief *amicus curiae*. The attorneys for the petitioner and the respondent have consented.

This brief is a response to the *amicus curiae* brief submitted by the American Psychological Association (APA). As such it is in support of respondent, Sandra Ann Craig.

Dr. Underwager is a member of the American Psychological Association. He and Ms. Wakefield are licensed psychologists under Minnesota statute.

Based upon their clinical practice, including diagnosis, evaluation and treatment of victims and perpetrators of child sexual abuse for over 25 years, their research in child sexual abuse in eight separate areas, their roles as consultants in over 1000 cases of child abuse accusations, as qualified expert witnesses in criminal and civil trials occurring in over forty states and five countries, they repectfully disagree with many of the claims and argument of the APA brief submitted to this court.[1]

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1. Dr. Underwager testified in the Jordan, Minnesota child abuse cases, the Cleveland-Middlesbrough Parliamentary Inquiry in England, and provided testimony to the Supreme Court of Holland.

Dr. Underwager and Ms. Wakefield are the authors of two learned treatises in the area of child sexual abuse and are publishers of a journal dealing with child abuse.[2]:

The powerful desire for social change produces shifts in attitudes and law not based upon empirical data but rather in response to a deeply felt need. The danger is that unintended consequences may emerge. IPT believes that this has happened in response to child sexual abuse. An unintended consequence is the likelihood of an unacceptable level of false positives, that is, persons wrongly identified as abusers and victims. The seriousness of accusations

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2. Wakefield and Underwager, Accusations of Child Sexual Abuse (1987); Wakefield and Underwager, The Real World of Child Interogations, (1989); *Issues in Child Abuse Accusations*, Northfield, MN..

of sexual abuse is that if such an error is made the lives of both adults and children are damaged and may be forever ruined.

A consideration completely ignored in the APA brief and also overlooked by prosecutors, law enforcement, child protection officers and judges is the effect on a child if adults make a false positive mistake. When adults treat a child who has not been abused as if the child had been abused, it is not an innocuous or benign experience for the child. It is devastating and may result in serious harm. It is an assault upon a young child's ability to develop the capacity to tell what is real from what is not real. To miss an instance where a child has been abused and commit a false negative error is also harmful to a child. Although there has been some discussion of this type of error there has

been no research on the issue. In either direction, adult errors may have tragic consequences for a child.

For the foregoing reasons, IPT respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

Repectfully submitted,

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IN THE

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NO. 89-478

STATE OF MARYLAND,
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v.

SANDRA ANN CRAIG,
Respondent

BRIEF OF AMICUS CURIAE

INSTITUTE FOR PSYCHOLOGICAL THERAPIES

IN SUPPORT OF SANDRA ANN CRAIG, RESPONDENT

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INTEREST OF AMICUS CURIAE

The interest of the Institute for Psychological Therapies is described in the accompanying Motion for Leave to File Brief *Amicus Curiae*. It can be summed up as the interest to support all reasonable and sound efforts to improve the accuracy of the way society responds to accusations of child sexual abuse for the protection of children and the protection of persons accused.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only reason for psychology to be given any attention by the law is the expectation that the science of psychology may improve the accuracy of the legal system. The first duty of psychologists who address the courts is to be accurate and scientifically credible. Psychology is a broad and diverse discipline.

Within psychology there are differences in the level of scientific status or credibility. The validity of specific concepts, theories, techniques, and research domains may vary from *high* and *clear* to *low* and *doubtful*.[1]

We strongly question the accuracy of the statement in the APA brief that "The resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with their alleged abuser" (APA pp.3-4). This opinion is not *high* and *clear* in the scientific support for its validity but is instead *low* and *doubtful*. Every claim advanced by the APA brief as a basis for encouraging this court to change the

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1. Meehl (1989). Law and Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist. *Behavioral Sciences & the Law*, 7(1), 521 - 550.

position of Kentucky v. Stincer 482 U.S.730 (1987) is of *low* and *doubtful* validity.

Further, the APA brief combines together research, clinical observation, clinical experience, and theory as if all had equal weight and can be considered as one piece (APA pp.3,10,15). The only support offered by the APA brief for its Point II is clinical observation and theory.

The final point in the argument of the APA brief is that research demonstrates children may refuse to testify, or testify less completely, and jurors may not be able to weigh children's testimony accurately. This may then result in a disservice to the truth-seeking rationale of the Confrontation Clause.

The truth-seeking rationale is described by Justice Scalia in a recent opinion:

> "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back. ' In the former context, even if a lie is told it will often be told less convincingly....The right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss - the right to cross-examine the accuser; both 'ensur[e] the integrity of the fact-finding process.' [citations omitted]. The State can hardly gainsay the profound effect upon a witness accuses. .... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser, or reveal the child coached a malevolent adult. It is a truism that constitutional protections have costs.*Coy v. Iowa*, 101 LEd 2d 857, 866 (1988).

The APA brief assumes that a child fears an accused person and therefore the capacity to testify is adversely affected. The assumption that the fear is

caused by having been abused by the defendant already assumes guilt and violates the presumption of innocence, ignoring the possibility that a child witness, in the interim between an accusation and testimony, may have been taught by adults to fear the accused. Fear may be learned from adults repeatedly telling a child that the accused has hurt them, is bad, wicked, should be punished, and is to be feared. To diminish the constitutional right to confrontation on the basis of the APA brief's assumptions would be to put individual rights at the mercy of either well-intentioned folly or deliberate vindictive manipulation. This point will be further developed in Point IV.

POINT I. The APA brief does not offer evidence with high and clear validity that serious emotional trauma may be inflicted upon children through courtroom confrontation with their alleged abusers. The APA brief overstates the data and fails to offer this court the limits and qualifications that must be placed upon the data cited.

The first citation of an authority to support the APA brief's claim, "A recent review of studies of child victims of sexual abuse showed that a significant proportion of victims suffer moderate to severe emotional distress after the episode is disclosed," is the Brown and Finkelhor (1986) article.[2]

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2. Browne & Finkelhor, Impact of Child Sexual Abuse: A Review of the Research, 99 Psychological Bull. 66 (1986)

This review was available in 1987. Further, by using the term victims, the APA brief already assumes the reality of the abuse. Disclosure is synonymous with proof certain. The APA brief claims the review established a factual proposition, but does not inform the court what the review actually claims about the validity of the data reported.

> "However, because many of the studies lacked standardized outcome measure and adequate comparison groups, it is not clear that these findings reflect the experience of all child victims of sexual abuse or are even representative of those children currently being seen in clinical settings. At this point the empirical literature on the initial effects of child sexual abuse would have to be considered sketchy ....Conclusions from the foregoing review must be tempered by the fact that they are based on a body of research that is still in its infancy. Most of the available studies have sample, design, and measurement problems that could invalidate their findings."[3]

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3. Id, pp.69,75

The brief cites forty-nine articles and presentations in the Table of Authorities, Of these, seven are post 1987 and could be seen as relating to the issue of effects of courtroom confrontation. Of the seven, six are unpublished papers or reports. Only one is published."[4]

The only other authority cited by the brief to claim "much stronger" evidence is now available are two unpublished reports by Goodman. Unpublished reports and unpublished data have minimal scientific credibility or standing. There has been no opportunity for the broader scientific community to evaluate the methodology and quality of the research. Thus, the assertion of "much stronger" evidence rests upon the

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4. Flin,Davis & Tarrant, The Child Witness (1988)

narrow base of one published article and two unpublished articles. It is a gross exaggeration for the APA brief to represent to this court that there is "much stronger" evidence after 1987."

Note #5 (APA Brief) includes, as a secondary citation, Conte and Berliner.[5] Once again the APA brief does not give this court the limits and qualifications.

> "... the factor analysis was somewhat disappointing .... We decided to create a series of clinical dimensions from items on the Behavioral Profile due to the relatively poor results of the factor analysis"[6]

What this means in plain language is that the authors did the statistical analysis to prevent individual bias and

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5. Conte & Berliner (1988). The Impact of Sexual Abuse on Children: Empirical Findings. In L. Walker, *Handbook on Sexual Abuse of Children.*

6. Id p 78.

subjective speculation and did not like what they got so they chose to ignore it and proceed with purely arbitrary *ad hoc* personal choices about behaviors, alleged to be shown by abused children.

> "Several methodological problems deserve special consideration....Measures of psychopathology do not appear to successfully describe the behavior or functioning of many abused children.... While the clinical dimensions and a summary total score do reliably describe the difference, there is some question in our mind how useful these board descriptors are either in directing clinical practice or in research efforts.[7]

Having abandoned any pretense of scientific procedure, this article cannot be viewed as scientific and should only be a source of possible hypotheses to be checked by a truly empirical approach.

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7. Id. p 86

To support the claims that face to face confrontation with the defendant is the chief source of trauma to children the APA brief refers to Goodman's Final Report to the National Institute of Justice; Runyan, et al.; Flin, et al.; and Berliner and Barbieri.[8] The Flin et al report does not support this claim. Indeed, forty-six children were interviewed prior to trial. Five children gave responses indicating fear of the accused. This is not most children in this study. Twenty-two children were observed testifying. Two demonstrated signs of distress. Runyan, et al.,[9]

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8. APA Brief Amicus Curiae, (1989), passim, pp. 7-13.

9. Runyan, Everson, Edelsohn, Hunter, & Coulter, Impact of Legal Intervention on Sexually Abused Children, 113 J. Pediatrics 647 (1988)

concludes that testifying in juvenile court is beneficial and suggests delay is the cause of potential harmful effects.[10] The use of Goodman's Final Report to support the claim that most children are fearful of confronting the accused is an overinterpretation of the reported data. Tables 14, 15, and 16 report similar frequencies for fear of testifying in court and negative reactions to seeing defendant in court. This data does not permit separating out which causes which. None of the frequencies in these tables warrant the claim that most children are fearful of seeing the defendant.

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10. The data in Runyan does not warrant a distinction in the impact between juvenile and criminal court but rather points to prolongation of the time period.

Kassin et al show that it is possible to get consensus among psychologists on what psychological topics meet the general acceptance provision of the Frye test.[11] The APA brief in this case offers no scientific information that meets the requirement of an adequate level of acceptance in the psychological community.

The APA brief does not support its claim of "much stronger" evidence with any credible and valid evidence. The APA brief does not offer data to support the claim that fear of courtroom confrontation is the characteristic of most children. The APA brief offers only speculative opinion, oversimplification,

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11. Kassin, Ellsworth & Smith (1989) The "General Acceptance" of Psychological Research on Eyewitness Testimony. *American Psychologist, 44*(8), pp.1089-1098.

overinterpretation, and inflated representations of preliminary studies. Therefore we urge the court to disregard this argument of the APA brief. There is no credible scientific support for it.

POINT II. Speculative theories and clinical experience cannot support assertions purporting to be factual but which have no basis in any empirical data. The APA brief frequently commits this error.

Until there is empirical data to establish an acceptable level of scientific support, clinical observations are hunches and not facts. When the APA brief proposes a "model" based on clinical experience an publications[12] without

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12. p.15, APA Brief. Finkelhor & Browne (1985). The Traumatic Impact of Child Sexual Abuse, *American Journal of Orthopsychiatry*, 55(4), pp. 530-541 does not claim to be based on any research. It is

warning this court that there is no factual basis for the proposed "model," once again *low* and *doubtful* material is being suggested to this court as a basis for a major change in a significant constitutional issue.

The APA Brief describes four speculative factors and then in each paragraph adds a conclusion for which there is not evidence either in the model or any cited research. The four unsupported conclusions are:

> "The fear, when present, may be rearoused in the presence of the defendant.... The strong emotion of betrayal may be rekindled when the vulnerable child confronts a formerly trusted defendant... When con-

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clearly offered as a speculative "conceptualizations. . . that can be used in both research and treatment" (p. 530) but not for the consideration of the U.S. Supreme Court. When the APA brief describes this model as based "to a lesser degree on systematic research," the lesser degree is none.

> fronted by the defendant, the child may reexperience the sense of helplessness or powerlessness. . . confrontation may arouse these complex and powerful emotions and interfere with the child victim-witness' ability to communicate reasonably" (APA pp. 15-16).

Also, authorities cited in Note 37, p. 16, do not support these statements. Burgess and Holmstrom is not a research study but field notes on adult victims of rape. They report 9 of 61 women gave "Afraid of man taking revenge" as a reason for not pressing charges.[13] Rogers concludes his article with this statement:

> Well intentioned yet misguided concerns for the safety and well-being of child victims of sexual assault have led many to conclude ... to great a risk of psychological trauma for the child victim. The alternative view, presented her and elsewhere, is that these risks have been over-stated."[14]

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13. Burgess & Holmstrom (1973). Rape: The Victim and the Criminal Justice System. *Victimology: A New Focus, 3*,Lexington Books, pp. 21-30.

No credible scientific support is offered by the APA brief for the argument that it is possible, on the basis of speculative theory and unreliable clinical observation, to make reliable and valid individualized determinations about the need for protective measures for children. Therefore we urge the court to understand the speculative nature of these pronouncements and not rely on them as a factor in a reasoned decision.

Point III. The APA Brief does not offer credible scientific evidence to support the assertion that emotional arousal may result in unreliable testimony.

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14. Rogers, Child Sexual Abuse and the Courts: Preliminary Findings *Social Work and Child Sexual Abuse*,p.144,151(1982).

The first authority cited by the APA brief to support a claim that a child victim-witness is "most likely to refuse to testify, to be unable to verbalize answers to questions, or to be tearful" (APA pp.18,19) is an anecdote from a court record. Anecdotal accounts are not scientific evidence and cannot be used to support a claim of scientific credibility.

In Point III the APA brief cites a study by Goodman et al.[15] However, in that study, reporting what is touted as ecologically valid research, that is more closely approaching a real world interrogation, using stressful medical procedures such as venipuncture and inocula-

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15. Goodman, Rudy, Bottoms & Amam, Children's Memory and Concerns: Ecological Issues in the Study of Children's Testimony in What Young Children Remember and Why (R. Fivush & Hudson)

tion, the literature review section includes "...there is reason to believe that high levels of stress are associated with better memory" (p. 34) and cites four studies. After describing the prediction prior to collecting data that stress would facilitate memory, this is the summary statement of the research results.

> "Our general finding was that stress had a facilitative effect on the children's reports. Specifically, planned comparisons revealed that children at the highest stress levels recalled more information than the other children and were less suggestible. Interestingly, the children had to reach a level of great distress before beneficial effects on memory were evidenced."[16]

It is difficult to understand how a research study by one of the principal authors of the brief, Goodman, whose work is the most frequently cited in the

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16. Id p. 34.

brief, could be overlooked or not understood. Yet, it denies both the premise and the conclusion of the argument in APA Brief Point III. Whatever the cause, the APA Brief presents a pattern of selective citation and selective reporting that requires caution and wariness in accepting any of the claims made therein.

Another problem occurring in several places in the APA Brief is shown in the citation of Hill and Hill.[17]

"One study indicated children...are more likely to omit information...than children who testify in a private room without the defendant present, as in a one-way closed circuit television arrangement." (APA p.21)

This study is the only one cited for the following conclusion that children's testimony is adversely affected by courtroom

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17. Hill & Hill, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809 (1987)

confrontation. However, Hill and Hill report that their results on this do not show statistical significance:

"While not significant in a one-way analysis of variance, there was a tendency for subjects in the small room to relate more central items in free recall than subjects in the courtroom ($p<.087$). (In social science research it is generally assumed that the means of two or more conditions are different if the probability of such an occurrence by chance is less than or equal to five percent.)"[18]

For the APA Brief not to inform the court that a study which is the sole basis for the climactic argument has no statistical significance, not even to use the term marginal significance, but to present it as a fact requires the court to exercise cautious reserve in evaluating the weight to be given to the brief.

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18. Id. p. 815, footnote #21

Point IV. In the interim between accusation and a trial, therapy for a child thought to be a victim is feeling-expressive, insight oriented therapy which may well have the effect of teaching a child to be afraid of a defendant.

Especially in criminal trials there is often a long time between an accusation and a child testifying. During this interim, many children are placed in therapy for having been sexually abused, a decision made before the factual issue is determined in the courtroom. Analysis of records of therapy given to 405 children[19] and review of 617 articles and books discussing treatment[20] shows that

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19. Wakefield & Underwager, Accusations of Child Sexual Abuse (1988)

20. IPT Resource File, category, treatment, contains 617 references dealing with treatment accorded to children when there is an accusation of sexual abuse.

the therapy given to children focuses on getting their feelings about being abused out and acting out those feelings in a variety of techniques. However, this often includes encouraging and reinforcing the expressing of anger and hatred toward the alleged perpetrator. If a child has spent time in therapy talking about how bad the defendant is, hitting a bobo doll identified as the defendant, drawing pictures of the defendant and burning them, making clay figures of the defendant and putting them in jail, or throwing darts at a picture of the defendant,[21] it is not surprising if that child may talk about fearing the accused and even show fear if seeing him or her in the courtroom. But the fear may well be caused by the treatment rather than by the alleged abuse.

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21. Such therapeutic behaviors are documented in the IPT files of actual cases.

If it can be demonstrated that a given child has been subjected to this therapeutic technique, confrontation in court may help to determine the cause of the fear, if it is present. While there is no scientific data to support this specific proposition, it may occur as it did in the trial of Robert and Lois Bentz, when their five-year-old son, Billy, who had been in foster care and therapy for months, was led into the courtroom by the prosecutor. He spied his parents, waved, smiled, and in a cheery voice called out, "Hi Mom, Hi Dad!"[22]

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22. Robert and Lois Bentz were the first persons tried in the Jordan, Minnesota sexual abuse accusations. The jury acquitted them on all counts in September, 1984, after a six week trial.

Conclusion

For the foregoing reasons, amicus respectfully urges the court to continue to accept the APA Brief in Kentucky v Stincer as the most accurate rendering of credible scientific evidence. The current APA Brief in Maryland v. Craig is flawed by an undeclared bias that causes a high frequency of overinterpreted statements, partial descriptions of research, simplification and leveling of complex outcomes, and selective reporting.

Above all other considerations, however, is the observed fact that the current APA brief offers only material that is of *low* and *doubtful* validity and lacks the required scientific status and level of acceptability for the court to consider it in reaching its decision. When considering the issue of a state in-

terest compelling limitations of an individual constitutional right, only the best information, solidly established in contact with the real world, should be able to move the state further to limit individual personal liberty and rights.

Respectfully submitted,

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers throughout the 50 states. The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices

and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the Confrontation Clause of the Sixth Amendment. The NACDL is very concerned about any decision which would undermine or restrict the scope of this constitutional guarantee, as would the adoption of the position taken by the Petitioners and the court below in the instant case.

The Amicus Curiae Committee of the NACDL has determined that the issues involved in this case are of such importance to criminal defense lawyers and their clients throughout the nation that the NACDL should offer its assistance to this Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Gary E. Bair, Assistant

Attorneys General, on behalf of Petitioners and Maria Cristina Gutierrez, on behalf of Respondent. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

Historically there is no question but that the Confrontation Clause of the Sixth Amendment has required a face to face confrontation between the accusing witness and the person accused. Coy v. Iowa, 108 S. Ct. 2798 (1988)

The court should not carve out an exception for child sex abuse cases. Research shows that children do make false allegations, in epidemic proportions. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.R. 19, 5, FN 79 Children do not make false allegations because they are lying,(that

would be the exception rather than the norm) but rather because they are prodded, coached and encouraged to do so by bumbling interviewers. Schetkey & Boverman, "Faulty Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annual Meeting of the American Acadamy of Psychiatry and the Law, October 10, 1985

Allowing children to testify via closed circuit television makes it too easy for a false allegation to persist. The Confrontation Clause of the Sixth Amendment was intended to place pressure on witnesses, so that jurors could best ferret out false allegations. To allow otherwise means that there will be an increase in unjust convictions in this sensitive area of law. The children will then have to bear a heavy burden of have unjustly convicted an innocent person, frequently a relative or

friend. This does not at all protect children.

ARGUMENT

ALLOWING CHILDREN TO TESTIFY VIA TELEVISION DOES NOT PROTECT CHILDREN BUT FACILITATES AND REWARDS THE FALSE TESTIMONY. SHOULD A CONVICTION RESULT, THE CHILD BEARS THE HEAVY BURDEN OF BEING RESPONSIBLE FOR AN UNJUST CONVICTION.

A. AN HISTORICAL ANALYSIS OF THE CONFRONTATION CLAUSE.

A case involving allegations of child sexual abuse raises in us all deep emotions, emotions that can cloud a fair analysis of important legal issues present in the case. There is, thus, a need to precede an application of case facts to modern-day law with an in depth report of the historical background of the fundamental right to confrontation.

Beginning at the beginning of Western culture, the Roman government recognized the importance of a face to face confrontation

with one's accuser. Defending one convicted of a crime without a fair trial, the disciple Paul argued to the Roman governor that, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face and has been given a chance to defend himself against the charges." The Holy Bible, Acts 25:16. The Western world has continued in the tradition of trials rooted in face to face confrontation between accuser and accused. We have borrowed the English word "confrontation" from ancient Latin words embodying the spirit of the words of Paul. "Con" comes from the Latin word "com" which means coming together. "Fron" comes from the Latin word "frons" which means forehead. Webster, Webster's New Twentieth Century Dictionary Unabridged, Second Edition, at page 383, Simon Schuster (1983). See, Coy

v Iowa, 108 S. Ct. 2798 (1988).

The most ancient method of trial in Europe was the "Trial by Ordeal." Religious in origin, the accused was put through a variety of tortures to determine guilt or innocence. For example, an accused was made to carry a hot iron for a distance of ten (10) feet. The hand was bandaged and kept under seal for three (3) days. If clean, the person was clean/innocent. If burned, the accused was unclean/guilty. The Ordeal had nothing to do with the confrontation of witnesses or evidence. It was witness, evidence, jury, and judge all rolled into one expeditious, if unfair, package. Plunckett, A Concise History of the Common Law, 5th Edition, (1929).

The Normans replaced the Trial by Ordeal with something called a "Wager of Law." Still essentially an Ordeal, it allowed

those accused some ability to call witnesses, who were also the jurors, in their behalf. Plunckett at 113, 427.

During the period of Tudor-Stuart absolutism in England, years 1485 to 1637, what we now know as a jury trial developed from the Norman concept of Wager of Law. Knappen, M.M., Constitutional and Legal History of England, Harcort, Brace and Co., (1942). At first the jurors were the witnesses to an alleged crime. They met in secrecy and decided the true nature of the facts in the case, each swearing under oath that the person was innocent/clean or guilty/unclean. Plunckett at 429, 433.

In the infamous Court of Star Chambers, with its ceiling painted with stars on a field of blue to resemble the evening sky, the King hauled citizens before Judges he appointed. Conviction upon conviction was

obtained through the use of Affidavits, sworn and unsworn. Keir, David, The Constitutional History of Modern Britain, D. Van Norstrand Co., Inc. (1948). Sir Walter Raleigh, popular with the people, but not with their King, was convicted of treason after trial by affidavits. Raleigh neither saw nor spoke to his accusers in the courtroom. The Affidavits were unimpeachable. Graham, "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another," 8 Crim.L.Bull. 99 (1972).

In 1536 with the enactment of a hallmark of freedom, Elizabeth's statute, finally came a law which in some cases compelled the attendance of witnesses at trials. Beginning in 1615 Sir Edward Coke, Chief Justice of the Court of Common Pleas tried valiantly, and failed, to carry forward the

notion that witnesses must attend trials and face those they accuse. Coke argued strenuously that there must be a separation of witnesses from jurors, allowing the jurors to judge the credibility of the witnesses. Plunckett at 435; Knappen at 400.

Distressed with the lack of justice in the English court systems, legal scholars such as Sir Edward Coke, looked to old Roman civil law to support, among other things, the "novel" concept of confrontation of witnesses. Oliver Wendell Holmes, The Common Law, (1881); Marcham, Frederick G., A Constitutional History of Modern England, 1485 to The Present, Harper and Bros. (1960). Despite the public outcry at the conviction of Sir Walter Raleigh, changes in convictions by ex parte depositions and affidavits, sworn or otherwise, were slow to

come. But towards the end of the seventeenth century, fewer courts accepted such hearsay statements, and the once widespread use of ex parte affidavits gradually fell from favor. Wigmore, J., Wigmore on Evidence, Volume 5, Section 1395 (J. Chadbourn rev. 1974).

The rule that what one person heard another say, hearsay, would not be allowed in a court of law was largely the result of the English experience that trial by affidavits and ex parte depositions failed to protect one against untrustworthiness. Long v State, 742 S.W.2d 302, 306 (Ct. Crim. App. Tex. 1987) (en banc). Under no circumstances should a trial be conducted so as to have the even the appearance of a star chamber proceeding. Dutton v State, 91 A.417, 422 (1914). The English gradually came to realize, as had the Romans before

them, that:

> "Many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. Long v State at 306, citing Wigmore, Wigmore on Evidence, 3rd ed., vol. 5, p. 3-11 (Boston: Little, Brown and Co., 1949).

The right of a face to face confrontation with an accusing witness developed alongside the concept of hearsay, from the realization that the one necessarily accompanied the other. William Shakespeare articulated this concept well when Richard the Second spoke: "Then call them to our presence -- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . ." Shakespeare, Richard II, Act 1, scene 1.

From Saint Paul pleading a man's case to a Roman governor in biblical times, to Shakespeare's Richard II, circles the notion

of face to face confrontation, forehead to forehead, of witness and accused in a criminal trial.

The first immigrants to America began their colonization at roughly the same time as the English common law began to leave behind medieval Trials by Ordeal and adopt more humane and logical methods of trial, which included a rule of confrontation of witnesses and its counterpart, the rule against the use hearsay. Indeed, one of the stated goals of American colonists was to mitigate the severity of the English common law, particularly to mitigate the severity of criminal law. Holden v Hardy, 169 U.S. 366, 386 (1898).

Still stinging from abuses at the hand of the crown, the colonists worked hard to protect and preserve in America the privileges recently granted an accused in

England.

Even before the American revolution, the Constitutions of many of the colonies reflected a right of confrontation in a criminal case. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development, Greenwood Press (1969).

The notable exception was the Puritan colony in Massachusetts which held lawyers and lawyering in low regard. So it was that in the Salem witchcraft trials in 1692 many of the new safeguards for one accused of a crime did not apply. "Witches" were not presumed innocent, could not employ counsel even if they could afford it, and a jury's verdict was subject to impeachment. The one right inviolate even in the Salem witchcraft trials was the right of confrontation. All of the children under the "spell of the

witches" were required to come to court and face to face with the witch, describe the sorcery. Starkley, M. The Devil in Massachusetts, A.A. Knopf (1949).

(As an aside, the parallels between the hysterical outbreak of allegations of witchcraft in Salem, Massachusetts and the wave of child sexual abuse allegations and trials are haunting. Though separated by nearly three hundred (300) years, the children claiming to be under the spell of witchcraft and children claiming sexual abuse in day care facilities say frighteningly similar things. The sordid allegations by the children against the witches and The Puritan Society's defense of the Salem children as incapable of lying about sorcery track step by step the sordid allegations by today's children against child care givers, and defenses of these

children as incapable of lying about sexual abuse. Compare, Starkley, M., The Devil in Massachusetts with Berliner and Barbieri, "The Testimony of the Child Victim of Sexual Assault," Journal of Social Issues, Vol 40 (1984) with Summit, Roland, "Child Accomodation Syndrome," 7 Child Abuse & Neglect 177 (1983), and with Victor Hugo's Les Miserables, (1862). "No one ever keeps a secret so well as a child.")

The United States Constitution, though passed without a right of confrontation, achieved ratification only after several states were assured that a Bill of Rights, which would include a right of confrontation, would soon follow. Levy, Constitutional Opinions: Aspects of the Bill of Rights, Oxford University Press (1986). Even so, many antifederalists vehemently opposed the ratification of a

Constitution which did not guaranty to a man, held to answer for a crime, the right to confront the witnesses against him. Kammen, The Origins of the American Constitution: A Documentary History, Viking Penguin, Inc. at 315-316 (1986) cited in Long v State at 307.

True to their word that the right to confrontation would be explicitly protected, authors of the constitution were quick to fashion the Bill of Rights from several state constitutions. James Madison introduced the Bill of Rights in 1789. It was adopted by Congress the same year and ratified in 1791. The Texas Court of Criminal Appeals reflected that:

> "Almost passively the right of confrontation found its way into every document that could be considered the forerunner of the Constitution. The necessity of its inclusion into the Constitution was apparently viewed to be simply absolute and so it was that confrontation became one of the

> guarantees accorded accused individuals. Its incorporation was apparently a foregone conclusion that generated no serious debate among the delegates simply because the right to confront one's accusers is one of the fundamental guarantees of life and liberty." Long v State at 308.

Beginning with Mattox v United States, 156 U.S. 237 (1895), the United States Supreme Court has examined the Confrontation Clause, allowing exceptions only upon a strong showing of the necessity for such hearsay, combined with the probability of its trustworthiness. In Mattox the court soundly approved the historical purposes of the right of face to face confrontation to:

> prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and gauge by his demeanor upon the stand

> and the manner in which he gives his testimony whether he is worthy of belief. Mattox at 242-243.

The Supreme Court's commitment to face to face confrontation of witnesses is exemplified in Pointer v Texas, 380 U.S. 400 (1965), where the court reversed a defendant's conviction where it was obtained with the use of a transcript of a trial at which the defendant was not represented by counsel (which meant that no effective confrontation had occurred.) The Court held that the Sixth Amendment right of an accused to confront witnesses against him was a fundamental right made obligatory on the State of Texas by the Fourteenth Amendment. Pointer v Texas at 403.

That the right of confrontation is indelibly linked to the right to cross-examination is inarguable. The right to a physical, face-to-face, confrontation has

never been ignored by the Court. Delaware v Fensterer, 474 U.S. 15 (1985). In this opinion the court articulated clearly that the:

> Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by the trial court on the scope of cross-examination. The first category reflects the Court's long-standing recognition that the literal right to "confront" the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause.

A departure from face-to-face confrontation has received judicial approval in two circumstances. Long v Texas at 315. In the first circumstance, the departure stems from an historically well-recognized exception to the hearsay rule, such as a dying declaration, excited utterances, or business records. Nevada Revised Statutes 51.335, NRS 51.095, NRS 51.285. In the second

circumstance the departure will be condoned **ONLY** in the face of manifest public necessity, and then only if the testimony is trustworthy. Ohio v Roberts, 448 U.S. 56 (1980); California v Green, 399 U.S. 149 (1970).

Most recently, in the context of a child sexual abuse case, the United States Supreme Court renewed a firm commitment to the right of an accused to a face-to-face confrontation with the witnesses against him, affirming that:

> We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. Coy v Iowa, at 2800.

B. CHILDREN ADOPT AS THEIR TRUTH THE ADULTS' PRECONCEIVED OPINION THAT ABUSE HAS OCCURRED, WHICH LEADS TO MANY FALSE ALLEGATIONS.

As a society, we have come a long way from the adult-oriented Puritan society which

executed twenty-some women and two dogs for witchcraft. See, Starkley, M., The Devil in Massachusetts. America is a society that dotes on children and strives to protect them from harm. Businesses capitalize on this fact. MacDonalds hamburger chain certainly does not market its product. It markets smiling, beautiful children. The MacDonalds message: use our product and you too will have smiling, beautiful children.

The goal of protection of children from all forms of abuse, whether it be physical or psychological, hunger, being homeless, or illiterate, is laudable.

Where abuse exists, and without question it does, in many forms, including sexual abuse, it is a tragedy.

America is awash in a sea of hysteria regarding child sexual abuse, just as the Puritans were hysterical in their belief

that children were under the spell of witches. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.R. 19, 54, FN 79. This too is a tragedy. In divorce cases child sexual abuse has replaced adultery as the "allegation of choice" to achieve one's goals. Diane H. Schetky, Emerging Issues in Child Psychiatry and the Law, Brunner/Mazel, Inc, 1985.

Many iron-clad prosecution "day care" abuse cases have fallen apart, such as People v McMartin, Superior Court for Los Angeles County, Case No. A750900; See, "The Sex Abuse Puzzle," Newsweek, November 13, 1989; the Bentz case from Jordan, Minnesota -- See, FN 12, Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv.L.Rev.

806, 807 (1985); State v Babayan, 106 Nev. (Ad. Op. 28) (February, 1990).

Many claim that hysteria cannot explain the increasing numbers of such allegations, because "kids don't lie about things like that." Berliner & Barbieri, "The Testimony of the Child Victim of Sexual Assault," 40 J. Soc. Issues, no. 2 at 125, 127 (1984).

This argument leaves unexplored many other avenues and options which explain a false allegation in terms other than a lie. Children interviewed by adults who believe that abuse has in fact occurred, learn about sex and sex abuse from the interviewer. The adult in effect, contaminates the child with the adult's preconceived opinions as to what happened. The adult provides the child through questions with knowledge of all of the terminology needed. Schetky, Diane, M.D., and Boverman, Harold, M.D., "Faulty

Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annuual Meeting of the American Academy of Psychiatry and the Law, Albuquerque, New Mexico, October 10, 1985.

Children in school, at church and via television are being bombarded with programs aimed at teaching children of the dangers of abuse. Footnotes 94 and 95 of Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv.L.Rev. 806, 820 FN 94 and 95 (1985); at 820 describe programs by Kermit the Frog, the Illusion Theatre, and Spider-Man intended to protect children from sex abuse. They also give young children quite an education in sex abuse.

Children are easy targets for bumbling interviewers whose "agenda" that abuse has occurred becomes the child's tale. Why?

Children are accessible targets for a number of reasons. They have been conditioned to comply with authority; they are in subordinate positions and are fearful of threats; they are susceptible to bribes and the promise of reward. In addition, children are often naive with regard to social norms and values . . . MacFarlane, Sexual Abuse of Children, in the Victimization of Women, 86, 88 (1978).

In State v Ryan, 103 Wash. 2d 140, 691 P.2d 197 (1984), the court noted that:

> both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

Children want to please adults, or anyone they view as an adult authority figure. Thus they are quick to pick up cues from the

adult that tell the child the "correct" answer. Children are susceptible to suggestion, to rewards; they sometimes have difficulty separating fantasy from reality. A.D. Yarney, The Psychology of Eyewitness Testimony, 204 (1979); Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 WayneL.Rev. 976, 977, 1003 (1969).

Children have no understanding of the serious consequences of the charges they make. Indeed, they perceive truth as the answer expected by an adult authority figure. J. Piaget, The Construction of Reality in the Child, (Routledge trans. 1970); J. Piaget, The Moral Judgment of the Child, (M. Gabain trans. 1950); See, Wilson v United States, 271 F.2d 492, (D.C. 1959); (citing, Guttmacher & Weihofen, Psychiatry and the Law, 374, (1952)).

A child simply adopts the adults' perception that abuse has occurred as her/his own "truth," when the reality may be that there was no abuse. Adults encourage, coach and reward a child to continue.

In People v Martin, 380 Ill. 328, 44 N.E.2d 49 (1942), a child twice confronted the accused and said that he was not her abuser. When police, the prosecutor, and the child's mother told her that he was the abuser, the child quickly caved in and said that he was. The child was not lying in the adult sense of the word, the child merely adopted as her truth what the adult authority figures believed to be true.

So it is then, that innocent adults are swept up in this climate of sex abuse hysteria, falsely accused by children. The children are victims, not of abuse but of

coaching, suggestion, and an unintended education in sex abuse at the hands of interviewers. See, Coy v Iowa, at 2802.

Petitioner argues that if child witnesses must face the one they accuse, that the guilty will go free. In 1603 Sir Walter Raleigh plead for confrontation with an absent witness and met a similar argument. He plead:

> The proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I gave done.
>
> This demand was sarcastically countered by Justice Warburton who, arguing much like Petitioner herein answered:
>
> I marvel, Sir Walter, that you being of such experience and wit should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses. 2 Howell's State Trials, 15-16, 18 (1816).

Often these child sexual abuse cases are not all they're cracked up to be. What may on the surface appear to be a clear case of

child abuse, turns out not to be at all. Many cases cannot withstand close scrutiny.

In child sexual abuse cases, just like in all other criminal cases, the ability to confront one's accusers -- face to face -- regardless of their ages is of utmost importance. It has been for centuries. Pollitt, "The Right of Confrontation: Its History and Modern Dress," 8 J.Pub.L. 381 (1959). The NACDL is deeply concerned that the court not allow one-way closed circuit television to pass for confrontation of a witness.

C. THERE ARE THE TECHNICAL PROBLEMS WITH TELEWITNESSES.

In Coy v Iowa, supra, the concurring opinion by Justice O'Connor suggests that children may, under some circumstances be allowed to testify via television out of the presence of the citizen accused. Id. at 2804, 2805.

Setting aside for a moment the violation of the Confrontation Clause inherent in such a scheme, there are technical difficulties with the "telewitness trials."

The equipment fails. The Joint Appendix is replete with references to equipment failures, so that the accused could not hear the child, could not communicate with counsel, the court reporter could not hear over the phone to transcribe literally. (JA 81, 84, 86, 88, 137, 139, 162, 174, 186, 187, 222) There were many times when the accused could not assist in cross examination, because she could not hear the child or could not reach her attorney on the telephone.

D. THE CAMERA BECOMES THE EYES OF OF THE JURY, WHICH DEPRIVES THE ACCUSED OF DEMEANOR EVIDENCE VITAL TO THE CONFRONTATION CLAUSE.

Telewitness trials wreak havoc with the Confrontation Clause in ways peculiar to

video cameras. The camera acts as a filter for the jury, focusing all twelve's attention on the same spot. With live testimony, one juror might watch the witnesses face, one wringing hands, still another may turn to see who the child looks to each time before an answer is given. No more. The camera selects the angle, which can make a witness look small and defenseless, or big and mean. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.Rev. 19, 74-75.

> Lighting can alter demeanor in a number of ways . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor . . .[A]nd off-camera evidence is necessarily excluded while the focus is on another part of their body . . .Thus, such use of closed circuit television may affect the jurors' impressions of the witness' demeanor and credibility . . . Also it is quite conceivable that the credibility of a witness whose testimony

> is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status . . . Such considerations are of particular importance when, as here, the demeanor and credibility of the witness are crucial to the state's case. Citing, Hochheiser v Superior Court, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984); Accord, United States v Benfield, 593 F.2d 815 (8th Cir. 1979).

The setting, or choice of the room used for the videotaping, (sometimes referred to as PVT's, Prerecorded Videotaped Trials) also plays an important part of the nonverbal message given the jury. It is a different message from other witnesses who testify in compliance with the Confrontation Clause. G. Millerson, The Technique of Lighting for Television and Motion Pictures, at 175, 178 (1972). One commentator suggests that:

> To demonstrate the problem, contrast a witness taped in a wood-paneled setting under soft lights with another taped in a brightly lit witness box.

> While these differences arise unintentionally under the PVTs piecemeal method of testimony taking, the possibility of intentional abuse to sway jurors is very real. See, FN 61, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Ore.L.R. at 576 (1976).

Jurors who have decided Prerecorded Videotape Trials (PVTs) have expressed the feeling that the "human element" of a trial was missing. A survey of PVT jurors asked if they would use a trialavision if faced with criminal prosecution suggests that television, essentially an entertainment medium, is a medium not suited for trials. Doret, "Trial by Videotape--Can Justice Be Seen To Be Done?," 47 Temp.L.Q.228 (1974).

The presentation of the telewitness, then, inadequately transmits demeanor evidence, which has historically been an important facet of the Confrontation Clause. Douglas v Alabama, 380 U.S. 415, 418-419 (1965); Note, "The Criminal Videotape Trial: Serious

Constitutional Questions," 55 Ore.L.R.567 (1976); J. Ruesch & W. Kees, Nonverbal Communication: Notes on the Visual Perception of Human Relations, 39 (1956).

The demeanor of a witness has traditionally been of great import in providing the jury with nonverbal evidence. Mattox v United States, 156 U.S. 237, 242 (1895); 3A J. Wigmore, Evidence, Section 946 (Chadbourn rev. 1970); C. McCormick, The Law of Evidence, Section 245 (2d ed. 1972).

At least one court felt that "special TV treatment" afforded the child as complaining witness may create a prejudice against the Defendant similar to that found when a Defendant appears in restraints in front of the jury. Hochheiser v Superior Court, supra at 788, 208 Cal. Rptr. at 279.

Does the use of television not also imply to the child, or "cue" the child, that s/he

is there to entertain, like Saturday morning cartoons, rather than to perform the solemn duty of a witness? Does the procedure "cue" the child that the court, too, believes in the truth of abuse, further contaminating the child's tender mind? See, Schetky, Diane, M.D., and Boverman, Harold, M.D., "Faulty Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annual Meeting of the American Academy of Psychiatry and the Law. Albuquerque, New Mexico, October 10, 1985, infra.

E. THERE WAS AN INSUFFICIENT SHOWING OF A COMPELLING NEED TO USE TELEVISION.

At least some of the children in the case at bar showed signs of recognizing that they were on stage, of being a little TOO comfortable with the setting. Jessie frequently questioned the questioner asking:

> "You know what?"
> "Do you know what he did to me?" JA at 204.

This child then volunteered without a hint of embarrassment that:

> In my private places. I've got a itchy. I've got itchy right here. Sometimes I itch right there. JA at 230.

Justin was quite a precocious child who seemed to be almost sparring with the court and counsel when each questioned him. This lad, too, seemed a little TOO at ease in the telesetting. For example, consider the following quotations:

> BY THE COURT:
>
> Q. And what is his name:
> A. I already told you his name? (Sic)
> Q. Elliot?
> A. Yeah.
> Q. I wasn't sure. I'm sorry. JA at 245.

The court is apologizing to the child for the formation of his question!!

Later, under cross examination the child again takes control:

> A. Yeah. Why are those golden bracelets around your arm? JA at 265.

Given this factual scenario, it is not surprising that the high court of Maryland considered the showing by the State insufficient to reach the high threshold required by that case (Coy) before Section 9-102 (allowing children to testify on TV under certain circumstances) may be invoked. (Pet. App. at 3a) The lower court found only that:

> "the testimony of each of these children **in a courtroom setting** will [result] in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate . . ." (Pet. App. at 4a) (Emphasis added.)

While the court articulated a policy of the protection of children, the harm from which he wishes to protect the children is not at all clear from his opinion. Experts testified that:

> Brian could not testify in an open courtroom such as this. JA at 22.
>
> I believe it would also be difficult for her because of her age to sit in front of a group of strangers whether they be Mrs. Craig or any other person and discuss the allegations. JA at 39.

> I believe that Justin would be, once again, he would have great difficulty talking in front of people . . . JA at 41.
>
> I think it would be very -- it would impair his ability to communicate. Id.

Assuming that this Court entertains notions of allowing children to accuse outside the presence of Mrs. Craig, it must never allow this to happen because the children fear an open courtroom. Any exception to the Confrontation Clause absolutely must be tailored as narrowly as possible, to fit the articulated need. There need be no blitzkrieg on the Confrontation Clause if the child's fear is of strangers or a public courtroom. Extreme care must be taken when searching for a correct balance between the policies protecting a child witness and the right of

an accused to a fair trial. See, Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982).

If a child fears judicial robes, address that concern. If the child fears a large room, address that concern. If a child fears strangers in public, address that concern. Changes in all of these areas have do not require an exception to the rule of face to face confrontation between witness and accused.

> The rights of confrontation and cross-examination have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. Greene v McElroy, 360 U.S. 474, 496-497 (1959).

With this case, the court should continue to zealously safeguard the Constitution. It should not hack out yet another exception to the Confrontation Clause, further eroding

what is left of it. There is a marked discrepancy between the "experts' testimony of children so terrified they curl up in fetal positions when they discuss these allegations (JA at 24) and the reality that in the courtroom (albeit via television) they showed little to no fear as witnesses. Indeed their precocious bantering, proves that in this case the use of television failed to fulfill an important constitutional policy. It did not insure that the children were impressed with the seriousness of the matter. California v Green, 399 U.S. 149,at 158 (1970). The lack of face to face confrontation casts doubt on the reliability of the testimony, which is of course why our country insisted on a right to face to face confrontation in the Bill of Rights in the first place. Mattox v United States, infra.

This case illustrates plainly that though there is a need for society to protect children, allowing them to testify in violation of the Confrontation Clause is not suited to addressing that need. Instead it encourages too cavalier an attitude on the part of the children who condemn a person presumed innocent. It deprives the jury of valued demeanor evidence by substituting the camera's lens for the jurors' lenses. It erodes the presumption of innocence.

The Constitution was carefully crafted by wise men, too familiar with trials which protected the accusers at the expense of convicting innocent people. The Court should not erase the carefully measured words of the founding fathers based upon this record in connection with child abuse cases.

F. CHILDREN WHO FALSELY ACCUSE ARE BEST PROTECTED BY A REQUIREMENT OF FACE TO FACE CONFRONTATION WHICH WILL DISCOURAGE SUCH TESTIMONY AND ALLOWS JURORS TO BETTER IDENTIFY IT.

The policy of protecting children is worthy. Children who make false allegations for the reasons explained herein are decidedly NOT protected by being allowed to testify via television. The suggested removal from a face to face confrontation with the person the child accuses makes it easier to persist in a false allegation. If a conviction should result, then the child is left with a lifelong burden of having convicted an innocent man or woman, who in many cases may be a close relative or friend.

The face to face confrontation requirement is meant to place the witness under pressure. The pressure allows the jury to sift the conscience of the witness. Mattox

v United States, infra. It is harder to accuse a person directly, and it should be. It impresses the witness with the seriousness of the matter at hand. Lee v Illinois, 476 U.S. 530 (1986). This practice should remain and will protect many children being responsible for a false conviction.

It may be that some legitimate cases of child abuse will go unprosecuted. This side affect of an important constitutional maxim was not unforseen by its drafters. Graham, "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One," at 128, FN 144.

It is far better that all children, those making legitimate allegations as well as those making false allegations, be protected by the court as much as possible within the confines of the constitution. This can only

be done by continuing to require a face to face confrontation between child and the accused.

CONCLUSION

Before any serious thought is given to removing the child, or the accused, from the courtroom, much less drastic measures must be tried. If they sufficiently protect the children, then the judicial system need go no further. This Court should therefore affirm the decision of the Court of Appeals of Maryland. (Pet. App. 3a)

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Supreme Court, U.S.
F I L E D
MAR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-478

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF THE ILLINOIS PUBLIC DEFENDER ASSOCIATION AND ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE, AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE ILLINOIS PUBLIC DEFENDER AND ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE, AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Illinois Public Defender Association is a private, non-profit organization of public defenders whose purpose is to insure the availability of quality legal services to all persons unable to

retain counsel in criminal cases. IPDA membership is composed of full-and part-time public defenders in 102 Illinois counties.

Illinois Attorneys for Criminal Justice is a private, non-profit organization of criminal defense attorneys and others interested in the criminal justice system. IACJ membership is comprised of members of the private bar, full-and part-time public defenders, and members of the legal education community.

IPDA and IACJ are vitally interested in assuring trial procedures which, while recognizing legitimate needs to protect minor complainants in sexual abuse crimes, respect the basic interests involved in the Sixth Amendment right to confrontation. In this case, the Court will decide whether allowing a minor to testify outside the personal presence of

the accused and the trier of fact is consistent with the purposes of the Confrontation Clause. IPDA and IACJ respectfully request this Court to consider its brief on this significant public question.

SUMMARY OF ARGUMENT

The Sixth Amendment right to face-to-face confrontation includes not merely the requirement that the witness testify in the presence of the defendant, but also that the trier of fact be personally present in order to observe the witness's demeanor and interaction with other persons. Only by personal observation can the jury make the critical credibility determinations essential to the truth-seeking function of a criminal trial.

Although cases in this area have concentrated primarily on the absence of the defendant during the witness's testimony, this Court should also consider the effect on the truth-seeking process of excluding the trier of fact from the witness's personal presence. In particular, this Court should be aware that at least one state has by legislation provided for the exclusion of the jury while requiring that the defendant be personally present.

Because the right to confrontation is violated not only where the defendant is precluded from observing the witness testify, but also where the trier of fact is excluded from the witness's personal presence, the relief granted by the lower court should be affirmed.

ARGUMENT

THE RIGHT TO FACE-TO-FACE CONFRONTATION INCLUDES NOT ONLY THE DEFENDANT'S RIGHT TO BE PRESENT WITHIN THE COURTROOM, BUT ALSO THE RIGHT TO HAVE THE TRIER OF FACT PERSONALLY PRESENT.

In Coy v. Iowa, 487 U.S. ____, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988), this Court held that the Sixth Amendment Confrontation Clause guarantees not only the opportunity to conduct cross-examination of State's witnesses, but also the right to have the witness testify in the personal presence of the defendant. Under Coy, any exception to the defendant's right to be present must be based on a case-specific showing that the witness is in need of special protection. In the present case, the Court will determine whether the Confrontation Clause permits any exceptions to the defendant s right to be present, and if

so, the nature of the prosecution's burden to show a need for special protection.

In determining these issues, this Court should not overlook that face-to-face confrontation includes not only the defendant's right to be present during the witness's testimony, but also the right to have the trier of fact personally observe the demeanor of the witness and his or her interaction with the defendant and other persons.[1] As Justice Scalia observed for the Court in Coy:

> It is always more difficult to tell a lie about a person "to his face" than "behind his back". In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusion.

101 L.Ed.2d at 866. (Emphasis added.)

---

[1] Although this question was not expressly involved in the case at bar, the Maryland Court of Appeals suggested in its opinion that no confrontation problem occurs when the defendant is present, even if the trier of fact is excluded. See 560 A.2d 1126, n.9.

While the right to have the jury observe the interaction of the witness with other persons has received less attention in recent years than the defendant's right to be present, that is merely because most cases have arisen under statutes which exclude the defendant from the witness's presence during the testimony. At least one state, however, specifically authorizes excluding the jury from the room where the testimony is given while requiring that the defendant be present. Section 106A-3

of the Illinois Code of Criminal Procedure provides:

> ... only the presiding judge and attorneys for the prosecution and defendant, the defendant, necessary security personnel, persons necessary to operate the recording equipment, and any person who, in the court's discretion, would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony ...
>
> Ill.Rev.Stat., 1989, Ch. 38, ¶106A-3 (the complete text ¶106A-3 is contained in the Appendix to this brief.)[2]

Allowing the jury to personally observe the witness's demeanor is essential to insuring the "integrity of the fact-finding process," the basic purpose of the Confrontation Clause. Coy, supra, 101 L.Ed.2d at 866. See also Lee v. Illinois, 476 U.S. 530, 540-541, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986). As far back as 1894, this Court noted that one objective of the Confrontation Clause is to require the witness's personal appearance, "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237 at 242-243, 39 L.Ed. 409, 15 S.Ct. 337 (1894). In California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970), this Court again held that a primary function of the Confrontation Clause is to allow the trier of fact to observe the witness's

---

[2] Although only the Illinois statute mandates that the defendant be present and the jury excluded, several states give the trial judge discretion to exclude the jury while permitting the defendant to remain. See Fla.Stat.Ann. §12.54(3)(4); N.J.Stat.Ann. 2A: 84A-32.4; Utah Code Ann. §77-35-15.5(2).

demeanor and thereby assess his credibility. 399 U.S. at 158. Even the dissenters in Coy, while objecting to the notion that the Confrontation Clause includes the right to require the witness to gaze upon the defendant during the testimony, regarded the right to have the jury observe the witness to be a "central" interest of the Confrontation Clause. Coy v. Iowa, supra, Blackmun, J., dissenting op. 101 L.Ed.2d at 871-872 (Rehnquist, J., concurring).

Various commentators have noted that permitting the factfinder to observe the demeanor of the witness is essential to determining credibility. See Note, The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes, 5 Fordham L.Rev. 995, 1006 (1985) (the purpose of face-to-face confrontation is

to allow the factfinder the opportunity to observe the demeanor of the witness when making his accusation in front of the one person who knows whether he is being truthful.) Evaluating a witness's credibility is one of the most difficult tasks facing a trier of fact, and personal observations of the witness are critical:

> More important . . . than knowledge of the substance of law and the law of evidence is "the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying . . . The most acute observer would never be able to catalogue the tones of voice, the passing shades of expres ion or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others.

Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 ABA Journal 580 at 581 (1961) (quoting from Stephen, The Indian Evidence

Act, With an Introduction on the Principles of Judicial Evidence, pp. 41-43.)

Furthermore, Wigmore regarded the witness's personal appearance before the jury to be a vital component of the right to confrontation:

> [T]he judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. . . . This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face-to-face. It is the witness' presence before the tribunal that secures the secondary advantage -- which might equally be obtained whether the opponent was or was not allowed to cross-examine.
>
> 5 Wigmore, Evidence, §1395(2), pg. 153-154 (Chadbourn rev. 1974). (Emphasis in original.)

It has been noted that the very process of televising a witness's

testimony presents serious issues regarding accuracy and fairness, such that the jury cannot make the same observations of a witness's demeanor as are possible when it is personally present. For example, the angle of the camera lens can distort appearance, and the lighting may change the witness's demeanor to the extent that in order to appear natural, the use of make-up is required. See Comment, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Oregon L.Rev. 567, 574-576 (1976). In addition, events which occur off-camera, including valuable first impressions such as the witness's entrance into the courtroom and approach to the witness stand, are beyond the jury's observation. Supra, at 576-577. See also State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 582 (1986) (even where use of closed circuit

testimony is permissible, the camera must be situated to allow those in the courtroom to observe all persons in the room except the cameraman).

Although the right to have the jury personally present has tended to be overlooked in the concern about the defendant's presence or absence from the proceedings, it is nonetheless a critical aspect of the right to confrontation and should be considered by this Court. Under a statute such as that utilized in Illinois, which allows persons other than counsel to be present during the testimony, the child's interaction with parents, foster parents and social workers may be critical to determining whether his testimony is believable. Where the camera shows only the witness rather than the entire room, the jury is left to speculate about the meaning of the

witness's reaction to other persons in the room. See Coy, supra, 101 L.Ed.2d at 866 (one of the primary dangers likely to be revealed by the jury's observation of the interaction between the witness and other persons is whether the child might have been "coached by a malevolent adult.") Even where the cameraman is situated so that the entire room is shown, variations such as camera angles and lighting may preclude a reliable determination of credibility.

In determining the nature of the right to confrontation under the Sixth Amendment, this Court should consider not only the effect of permitting a witness to make his or her accusations without being required to confront the accused face-to-face, but also the effect of preventing the trier of fact from making the basic observations which determine

whether the witness's testimony is credible. Because the truth-seeking function of the Confrontation Clause is undermined where a witness is permitted to testify outside the presence of the defendant or the trier of fact, this Court should affirm the relief granted by the Maryland Court of Appeals.

CONCLUSION

The Sixth Amendment right to confrontation has traditionally been interpreted as including not only the requirement that witnesses in a criminal trial testify in the presence of the accused, but also that the trier of fact be personally present to observe the demeanor of the witness and his or her interaction with the defendant and other persons. Because viewing a witness's testimony over a television monitor deprives the trier of fact of the opportunity to make the basic observations essential to determining credibility, this Court should hold that unless there is a showing that the particular witness in question is in need of special protection, his or her testimony must be given in the personal presence of not only the defendant but also the trier of

fact. Such a requirement would permit the jury to perform its duty to determine credibility and is essential to protect the interests guaranteed by the Confrontation Clause.

For the above stated reasons, this Court should affirm the relief granted below.

Respectfully submitted,

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APPENDIX

Ill.Rev.Stats., 1989, Ch. 38, ¶106A-3:

> The court may, on the motion of the attorney for any party and upon finding that it is in the best interest of the child, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the presiding judge and attorneys for the prosecution and defendant, the defendant, necessary security personnel, persons necessary to operate the recording equipment, and any person who, in the court's discretion, would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the prosecuting attorney, the defense counsel or the court may question the child. The court, in its discretion, may require that persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his

testimony, but does not permit the child to see or hear them.

If the court orders the testimony of a child to be taken under this Section, the child may not be required to testify in the presence of anyone other than those who are authorized by this Act to be present when the testimony is taken.

FOR ARGUMENT

MAR 02 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

—v.—

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RICHARD A. GARDNER, M.D., *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF RICHARD A. GARDNER, M.D., AMICUS CURIAE, IN SUPPORT OF RESPONDENT

This brief amicus curiae is being filed pursuant to Rule 36.2 with the written consent of the petitioner and the respondent. It is directed at communicating to the Court the conclusions I have come to after many years of experience in evaluating claims of sexual abuse upon a narrow issue,

i.e., whether it is helpful or hurtful to the child and the truth-seeking process for the allegedly abused child to be in a face-to-face situation with the accused. My interest in this matter flows from more than 30 years of experience in the field of child psychiatry and very extensive involvement in the issue of the proper means for differentiating between genuine and fabricated child sex abuse, upon which subject I have published a book and numerous articles. In preparation for this brief I have examined the brief submitted by the State of Maryland as well as the *amicus* brief submitted by the American Psychological Association (hereinafter the APA), as well as the *amicus* brief submitted by the APA to this Court in 1987 in *Kentucky v. Stincer*.

To assist the Court in evaluating the merit of my judgments and opinions, there is

attached as an appendix hereto a foreshortened version of my *curriculum vitae*.

My main point is that whatever procedure is employed--whether it be in a courtroom setting or in a mental health professional's office--face-to-face contact between the accuser and the accused is absolutely essential to an examination designed to determine with reasonable reliability the question whether sexual abuse has occurred. In my opinion, such a face-to-face experience is essential to permit the fact-finder, whoever it may be, to observe the interactions betwen the accuser and the accused when they confront each other. This is just as much a requirement for a child witness as it is for an adult witness. The most valuable and predictable way of learning the truth is allowing the accused and the accuser to have a direct verbal confrontation which is observed by the fact-

finder. Whether or not this motivated the placement of the confron-tation clause in the Constitution, I am certain that in modern day life it is a critical component of a fair evaluation of claims of sex abuse of children.

The Issue of Psychological Trauma

Confronting a child in order to learn whether or not sexual abuse has taken place is inevitably traumatizing to the child. Whether the inquiry takes place on the witness stand, in the judge's chambers, in the prosecutor's or lawyer's office, or in the office of a mental health professional, the child is going to be psychologically traumatized. The procedures are strange and frightening to the child. Interviewers, whether they go slowly or quickly, inevitably wish to focus on issues which are embarrassing, anxiety provoking, and laden with tension. In situations in which the

abuse has been genuine, the child may have been threatened (even with death) if the abuse is divulged. And in situations in which the abuse is fabricated, the child is in a loyalty conflict between the adult who has been encouraging and programming the child to fabricate the abuse and the consequences of the allegation to the well-being and life of the accused. Furthermore, the younger the child the more likely the child will try to ingratiate himself (herself) with the evaluator, and this too produces tensions and anxieties because the child fears that he (she) will not get the "right" answers. Because there is no good solution to this problem, because there is no way of protecting the child completely from psychological trauma, the best we can do is utilize those procedures that involve the least degree of psychological trauma. We do well to operate here in compliance

with the principle that we choose the least psychologically detrimental of all the detrimental options without sacrificing the benefits to be derived from the face-to-face confrontation.

The amicus brief submitted by the APA does not address itself to the psychological trauma of the accused's being falsely convicted and sometimes incarcerated. Although there are certainly many bona fide sex abuse perpetrators who were found not to be guilty by judges and juries, there are also many innocents who are in jail because they were falsely found guilty of sex abuse. The APA brief focuses exclusively on the child; yet I am sure those who formulated the APA brief are well aware of the psychological trauma that a falsely accused person suffers throughout the course of the investigation and trial, and especially if incarcerated. This person's psychological

trauma must also be considered unless we start with the assumption, even in advance of the court's truth-seeking process, that the accused is guilty and therefore the trauma to his psyche is irrelevant. Even without incarceration, and even without conviction, the very allegation has often ruined lives. The accused's psychological trauma is intensified by the sense of impotency experienced in the courtroom, which does not permit the direct, face-to-face interchange in which the two can communicate with one another in some fashion. This element in the psychological trauma to the accused is reduced to the extent that the accused is at least able to see his or her accuser face-to-face.

I recognize that in some cases such direct confrontations may be psychologically detrimental to the child. But we are not dealing here with a situation in which we

can hope for complete protection from such trauma for any of the involved parties. Moreover, I am in agreement with the APA's position that some children may benefit from the experience of testifying against their abusers. Confronting the accused provides the child with a sense of power, release of anger, and some sense of control. The child is participating in the process which may bring about future protection from the accused.

The "Scientific" Basis For The APA's Position

As the Court probably already appreciates, psychology and psychiatry are far from being exact sciences. Often the word "scientific" is included in our publications in order to compensate for the basic weakness of some of our arguments. There are certain areas within these fields in which scientific objectivity is possible,

but interviewing allegedly sex abused children is not one of them. Accordingly, the Court does well, when considering the APA brief, to recognize that when the word "scientific" is being used, it is done in the service of trying to bolster what is probably a weak argument. I myself, recognizing that my brief is also subjective and empirical, have not used the word "scientific." For every article the APA quotes in support of some position, there is another article that refutes it. And even the brief itself makes reference to these conflicts. There is no study in the field of child sex abuse which is flawless if one subjects the study to the kinds of rigorous scientific criteria utilized in mathematics, physics, chemistry, biology, and engineering.

My main criticism of the APA amicus brief is with its conclusion that the Court allow

for a relaxation of the rights of the accused under the Sixth Amendment to the Constitution by allowing testimony of a child to be taken without the child's confronting the person he or she is accusing. There is in my opinion no "scientific" basis for support of this view; and there is certainly no basis for abandoning the contrary position that the APA presented to this Court in 1987 in its amicus brief in Kentucky v. Stincer.

I am aware that a judgment foreclosing the right of confrontation is supposedly made on an individualized basis after a psycholoigist or other mental health professional testifies as to the traumatic effect on the child in this particular situation. This testimony frequently consists of routine boiler-plate contentions by a professional committed to the prosecution, and since a mental health

examination of the child witness by a defense psychologist is often not permitted, the defendant cannot contest these one-sided claims.

Ways Of Reducing Trauma To Children

All agree that the primary question is what method of inquiry is most likely to enable investigators to learn what really happened. The more effective the method of inquiry, the greater the likelihood the cause of justice will be served. The price that must be paid in the course of such inquiries is psychological trauma. But the psychological risk to all parties--not just the child--must be considered.

There are ways of reducing the potential psychological trauma to the child, which I will discuss below. These do not include eliminating face-to-face meetings with the accused, because by doing so one of the most reliable elements of the truth-seeking

process is eliminated. Thus the task of the legislature and the courts is not to eliminate the right of confrontation but rather to develop means and methods of minimizing the psychological trauma that results from the truth-seeking process.

There are certain practices that can be followed to reduce (but not remove entirely) the psychological trauma of such inquiries. One is to make them short. The greater the number of interviews, and the greater the number of interviewers, the greater the degree of psychological trauma. Prior to the trial, children who allege sex abuse are generally subjected to a series of interviews by prosecutors, child protection team evaluators, lawyers, and mental health professionals. The record in this case shows a clear example of the extent to which the interview and re-interview process is employed to shape the testimony of child

witnesses. To avoid effective corruption of the fact-finding process, the Court must take control of the elaborate interviewing process which predominates in these cases and which frequently produces testimony of questionalbe validity. The trauma to the child is often exacerbated by the pressure to give the interviewer what he or she seeks. And once in court, the courtroom proceedings are predictably drawn out. Direct examination, cross examination, redirect, and recross inevitably add to the duration of the inquiry. Confining the child to yes-no responses further lengthens the duration of the examinations.

Because of the emphasis that has been placed upon denying the right of confrontation, little serious effort has gone into seeking to lessen trauma on both sides because advocates in this field have opted to seek legislation which effectively

removes the right of confrontation.

Conclusion

Recently I wrote:[1]

> [T]he hysteria and fury associated with a sex-abuse allegation may be unparalleled. The sexual exploitation of a child is viewed by our society as one of the most heinous crimes.
>
> ***
>
> Often, incompetent examiners, many of whom are zealots, conduct the evaluations... These individuals also subscribe strongly (and even fanatically) to the position that children never lie and that any allegation of sex abuse must be true. Many of the validators (a loaded title if there ever was one) fear losing their jobs if they conclude that too many of the investigated clients are innocent or the charges unsubstantiated. A whole power structure has grown up in which an army of prosecutors, detectives, investigators, and others rely on a continual stream of positive findings and convictions if they are to justify their ever-increasing demands for more funds from legislatures. If custody litigation is to be considered "a can of worms" then sex-abuse litigation can only be considered "a can of poisonous snakes."

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[1] Gardner, FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1989).

Any professional familiar with sex abuse charges in custody situations will attest for the foregoing. Any professional who has followed the sorry story of the McMartin case in California, the Scott County cases in Minnesota, and numerous other cases will attest to the foregoing in the criminal law context. The rash of legislation, such as that in Maryland and some 30 other states, providing for the denial of face-to-face encounters between the accused and the accuser is an element of heightened hysteria and a failure to adopt measures which strengthen the truth-seeking process in child sex abuse cases in an effective and constitutional manner.

Respectfully submitted,

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APPENDIX

I am a child psychiatrist and adult psychoanalyst. I trained in adult and child psychiatry at the Columbia-Presbyterian Medical Center, New York City, and took my psychoanalytic training at the William A. White Psychoanalytic Institute in New York City. Since the completion of my training in the early 1960s I have been in private practice. I am also on the faculty of the Columbia University College of Physicians and Surgeons and since 1983 have held the academic rank of Clinical Professor of Child Psychiatry.

My involvement in forensic psychiatry began in the years 1960-1962 when I served as chief of child psychiatry at the U.S. Army Hospital in Frankfurt am Main, Germany. During that period I had extensive experience testifying both in miliary and German civilian courts. In the mid-1960s,

with the rising divorce rate, I began involvement in child custody litigation--an involvement which has continued to the present day. I have written two books on the subject of conducting evaluations in child custody litigation[2] and one on the psychological consequences to children and parents resulting from involvement in child custody litigation.[3] All of these books have been considered authoritative sources on the subject of both legal and mental health professionals. Furthermore, I have written approximately 20 articles and book chapters on these subjects, both in legal and mental

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[2] Gardner, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1982); Gardner, FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION. Creative Therapeutics, Cresskill, New Jersey (1989).

[3] Gardner, CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS. Creative Therapeutics, Cresskill, New Jersey (1986).

health publications, and have lectured extensively on these subjects as well to both legal and mental health professionals throughout the United States and occasionally abroad. My extensive experience in the field of child custody litigation led me to the compelling conclusion that the best and most effecient way to learn the "truth" from litigating parents was face-to-face confrontation.

In the late 1970s I began seeing a relatively new phenomenon, namely, the utilization of fabricated sex abuse allegations in the contest of child custody disputes. In some cases there was <u>bona fide</u> abuse, but in most the allegations were false and designed to wreak vengeance on the accused and/or strengthen the position of the accuser in the custody litigation. Thus began my involvement in differentiating between <u>bona fide</u> and fabricated sex abuse

allegations. These experiences culminated in the publication of my book on the subject.[4] Once again, I lectured extensively in this area to both legal and mental health professionals and have published articles on the subject as well.

My work in the field of custody disputes inevitably led me to the same problem of differentiating between valid and false claims of sexual abuse, as such questions developed in criminal prosecutions.

Also relevant to this brief are my contributions in the area of engaging resistant, uncooperative, and otherwise difficult-to-interview children.[5] I have

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[4] Gardner, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE. Creative Therapeutics, Cresskill, New Jersey (1987).

[5] Gardner, THERAPEUTIC COMMUNICATION WITH CHILDREN: THE MUTUAL STORYTELLING TECHNIQUE. Jason Aronson Inc., Northvae, New Jersey (1971); Gardner, PSYCHOTHERAPEUTIC APPROACHES TO THE

lectured extensively in this area and my books on the subject have become standard reference works.

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In the
Supreme Court of the United States
October Term, 1989

No. 89-478

State of Maryland,

Petitioner,

v.

Sandra Ann Craig,

Respondent.

BRIEF *AMICUS CURIAE* OF VICTIMS OF CHILD ABUSE LAWS NATIONAL NETWORK (VOCAL) In Support of Respondent

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INTEREST OF *AMICUS CURIAE*

This brief is submitted with the written consents of the parties, which consents are on file with the clerk. Originally founded in Minnesota in 1984, Victims of Child Abuse Laws (VOCAL) is a non-profit educational and family advocacy organization comprised of professionals concerned with the proper handling of charges of abuse and of individuals, many of whom have been falsely accused

of violations of child protection laws. VOCAL has over 130 affiliated chapters throughout the United States, including the National Association of State VOCAL Organizations. Total membership in VOCAL is estimated at 10-12,000.

VOCAL's beginnings make clear its interest in this case. VOCAL was founded in the aftermath of a child sexual abuse scandal in Jordan, Minnesota, in which nearly two dozen adults were falsely accused of engaging in a variety of sex acts with their own and others' children and of committing other abhorrent crimes. As the former targets of false accusations of child abuse, many of whom have been through the ordeals of arrest and/or prosecution, the members of VOCAL bring to the current debate regarding the investigation and prosecution of child abuse cases an important and unique perspective.

INTRODUCTION

Although psychologists, social workers, police and prosecutors have been well aware of the sexual abuse of children both within and outside of the family for decades, it wasn't until relatively recently that the problem became the subject of great public concern. In part due to the rape awareness movement led by feminists and advocates for rape victims and to advancements in the social sciences, during the late 1970s and early 1980s child sexual abuse was uncovered as a widespread social problem. As one writer recently remarked,

> [c]hild sexual exploitation has emerged in only ten years from obscurity to become a major crime of major proportions. What is even more remarkable than our recent "discovery" of child sexual abuse is the fact that it has remained hidden so long.[1]

Amicus views the emergence of child sexual abuse as a major social concern to be a positive social development and does not wish to suggest that society ought to return to a time when child sexual abuse could not be confronted openly. In fact, Amicus specifically believes that the position taken by it here will contribute to further openness with respect to exposing the horrors of child abuse.

ARGUMENT

I. The severe stigma suffered by those accused of child sexual abuse necessitates the safeguarding of the accused's constitional rights from initial investigation through trial. Such rights of the accused include the right to face-to-face confrontation with witnesses.

There is probably no crime considered so heinous as the sexual abuse of a child. As Lloyd Martin, a crusader against the exploitation of children and an effective investigator for the Los Angeles Police Department, told Congress in 1977:

> To me, gentlemen, a crime against a child has no equal. It is worse than a homicide. A homicide is tragic, but it is over with. The victim of sexual exploitation has to live the rest of their

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[1] Roland Summit, M.D., Department of Psychiatry, University of California at Los Angeles, in *Interviewing Child Victims of Exploitation*, National Center for Missing and Exploited Children, February 1987, Introduction, p. v.

[sic] lives....[2]

Mr. Martin is not alone in this sentiment. The scores of child protection laws that have been enacted since 1977 bear witness to the fact that "[o]f all of the crimes known to our society, perhaps none is more revolting than the sexual exploitation of children...."[3]

Because of the serious nature of the crime and the intense feelings which it provokes, merely being accused of the crime of child sexual abuse will have a profound effect on the accused's life. As one former prosecutor put it,

> When an allegation of child sexual abuse is made against a man or woman and that allegation becomes in any fashion public knowledge, the person begins to suffer immediate and serious consequences. From that moment on, the person will never be viewed in the same fashion by his or her friends, neighbors, or even loved ones. He or she will be shunned by other persons within their community, especially those having small children.[4]

Such a serious stigma is placed on those accused of sexual abuse, that where the accused is innocent of the charges against

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[2] Testimony of Lloyd Martin, Investigator, Los Angeles Police Department, Juvenile Division, Sexually Exploited Child Unit, in *Sexual Exploitation of Children*, Hearings before the Subcommittee on Select Education of the Committee on Education and Labor, House of Representatives, 95th Congress, 1st Session, May 27, 1977, p. 46.

[3] *Child Sexual Abuse and Pornography Act of 1986*, 99th Congress, 2nd Session, House of Representatives, House Report 99-910, p. 3.

[4] Howson, R.N., "Child Sexual Abuse Cases: Dangerous Trends and Possible Solutions," *Champion, Journal of Trial Lawyers*, August 1985, p. 6.

him or her, he or she will undoubtedly quickly discover that "there is no opportunity for true 'vindication' within the criminal justice system.... The finding of 'not guilty' represents only a statement that there was insufficient evidence for a judge or jury to convict the individual."[5] As numerous authorities have concluded, "[o]nce [fictitious] allegations are raised, they are extremely difficult to rule out and the accused may never feel he has been 'cleared' of suspicions."[6]

It is a hallmark of our system of criminal justice that the accused is innocent until proven guilty beyond a reasonable doubt. Yet the deep concern which we all share for the health and safety of children threatens -- if not properly balanced with other values and principles upon which our society is based -- to reverse the equation and hold the accused responsible for proving his or her innocence.

In the current climate, many social workers, therapists, prosecutors, and "child advocates" believe that to question an accusation of child abuse is, at best, insensitive and socially irresponsible and, at worst, a betrayal of the child and collusion with those who would abuse them. Some child advocates have even arrogantly suggested that their task is not to discover the truth of an accusation, but to prove abuse once it has been alleged. As one social worker put it:

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[5] Ibid., p. 6.

[6] p. 52, Kaser-Boyd, N., "Fictitious Allegations of Sexual Abuse in Marital Dissolutions," *Family Law News, Offical Publication of the State Bar of California Family Law Section*, Vol. 11, No. 4, Fall, 1988, p. 52.

been uncovered. That children may lie about sexual abuse or be misled or coerced by adults into giving false testimony, wittingly or unwittingly, is a truism. Unfortunately, the emotional nature of cases involving allegations of child sexual abuse often prevents objectivity on the part of those whose job it is to ferret out and prosecute such abuse. The case descriptions and quotations set forth below conclusively support these contentions of Amicus.

- In Jordan, Minnesota, 24 adults were charged with molesting 37 children and 25 children were placed in foster homes during the course of an investigation of immense proportions, involving numerous state and federal agencies, including the FBI. Many of the accused were couples accused of engaging in sexual activities with their own children and in a variety of cruel and bizarre acts, including homicide, the torture and killing of animals, the production of pornography, and the practice of satanically-tinged sexual rites *en masse*. After 2 defendants were acquitted at trial and charges against another 21 defendants were voluntarily dropped by the prosecutor's office, the Minnesota Attorney General's office was asked to find out what had gone awry in the investigation.

The Attorney General's report revealed not only that the investigation into the initial allegations was severly flawed, but also that the child witnesses had fabricated much of the "evidence" at the behest of those conducting the initial investigation -- namely, the prosecution team, police, and child protection workers. The methods used by investigators were nothing short of inquisatorial. "In many cases," the Report states,

> children were removed from their homes and isolated from all family contact for prolonged periods, even though the children denied having been sexually abused. In some instances, the children did not "admit" that their parents had abused them until several months of such separation, marked by continuous questioning about abuse. In the most extreme cases, these children were also told that reunification with their families would be facilitated by "admissions" of sex abuse by their parents and other adults.[10]

The Jordan cases clearly demonstrate that prolonged interrogation of alleged child-victims "may result in confusion between fact and fantasy."[11] A therapist for one of the alleged victims told the Attorney General's office that

> repeated interrogation of this child has rendered him psychologicaly incapable of distinguishing among what actually happened, what he has previously described, and what has been told by others.[12]

Another serious flaw in the Jordan cases was the lack of corroborative evidence. With the single exception of the investigation of James Rud, the only adult in the Jordan scandal to be convicted of sexual abuse,

> none of the efforts to obtain incriminating evidence of sex abuse from the defendants or from other potential adult witnesses produced any fruit whatsoever.[13]

As the Scott County Report concluded,

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[10] *Report on Scott County Investigations*, Hubert H. Humphrey III, Attorney General for the State of Minnesota, February 12, 1985 (hereinafter cited as the "Scott County Report"), p. 9.

[11] Scott County Report, p. 11.

[12] Scott County Report, p. 11.

[13] Scott County Report, p. 14.

> The Federal Bureau of Investigation and the Minnesota Bureau of Criminal Apprehension concluded that there was no credible evidence of murders in Scott County connected to the activities of any child sex abuse ring. In addition, no reliable evidence of the existence of pornographic materials was discovered. Finally, their recommendation is that there is presently a lack of credible evidence which would provide a basis for pursuing any criminal charges in these cases.[14]

- In Honolulu, Hawaii, defendant James McKellar was accused of kidnapping 2 girls, ages three years and eleven months, and four and a half years, respectively, from their day care center and taking them to his house where he allegedly engaged in sexual acts with and photographed them. After a thorough investigation by the defense, the defense conclusively established that the children had been manipulated into fabricating a tale of abduction and sexual abuse which, in fact, could not ever have occurred. The charges against McKellar were dismissed by the court which ruled that since "the children have been led and taught by the adults to produce the hoped for responses" they lacked "personal knowledge, because they have no memory which the court can be assured is their personal recollection of the 'event'".[15]

In criticizing the method and manner in which the allegations were reported and investigated, the court stated

> Every adult accepted as fact that the Cathys had been abused and, consciously or unconsciously, their questions were shaped to satisfy their own beliefs. No matter how absurd or equivocal was a response, the adults interpreted it to fit their views. In the process, the Cathys were taught the information that has been ascribed to them."[16]

[14] Scott County Report, pp. 16-17.

[15] Hawaii v. McKellar, Crim. No. 85-0553, In the Circuit Court of the 1st Circuit, State of Hawaii, Order dated January 15, 1986 (Klein, R.G, Judge), pp. 15, 20.

The McKellar case not only points to the possibility that false testimony may be unwittingly elicted from children, but also indicates the dangers facing child witnesses who are so manipulated. Moreover, the case underscores the necessity for caution in investigating allegations of child abuse. The fact that allegations were pursued as far as they were is profoundly disturbing in light of the court's finding that overzealous investigation methods not only seriously disrupted the defendant's career and life, but caused the child-witnesses profound and certainly avoidable emotional harm. "Because the children now believe that such abuse occurred," the court found, "they are unable to separate the facts from the learned experience and, consequently, their behavior is just the same as if they were abused."[17]

Although we can only speculate, had McKellar gone to trial on the charges against him, his fate and the fate of his accusers may have depended upon a face-to-face confrontation and the jury's assessment of the reliability of the witnesses and testimony before them.

- In June 1984, a 5-year-old girl in Bakersfield, California reported that she and two other children had been sexually abused by two men. An investigation was begun immediately and, over the next year, children told investigators of satanic rites and the ritualistic murder of animals and children, and named several dozen victims and perpetrators, including, eventually, caseworkers and investigators themselves. By mid-1985, in a case which came to be

[16] Hawaii v. McKellar, p. 15.

[17] Hawaii v. McKellar, p. 19.

known as the "Satanic Ritual Case," twenty-one children had been removed from their homes and taken into protective custody.

Allegedly, children told investigators that

> they were made to stab babies, drink blood, worship Satan at a "bad church" where black candles burned during the ceremonies.... They recounted the ritualized murders of at least 12 babies and small children. The rituals also included the alleged sacrificing of animals, such as kittens, pigs, wolves, and dogs.[18]

Despite the lurid details provided by the children, the Bakersfield Sheriff's Department "uncovered no physical evidence to corroborate the children's stories and found much to disprove some of their statements."[19] This, however, did not dissuade the District Attorney's office from filing criminal complaints against nine suspects, charging them with sexual abuse. Several months later, the Sheriff's Department submitted eleven additional requests for felony complaints to the District Attorney, but these were rejected. Of the nine complaints issued during the course of the Kern County case, seven suspects were bound over for trial in Superior Court on various felony charges of child sexual abuse. Only one defendant, however, was tried and convicted. His conviction was later set aside on nearly every count and he was never re-tried on the few that remained.[20]

When it was apparent that the Satanic Ritual Case had fallen apart, California Attorney General John K. van de Kamp was called in to assess what went wrong. Not the least of what the

[18] Kern County Report, p. 9.

[19] Kern County Report, p. viii.

[20] Kern County Report, pp. 63-64.

Attorney General found wrong was the effect which the attitudes and methods employed by child abuse investigators had upon the gathering of evidence. For example, the report found that

> [T]he prevailing attitude of the interviewers was that 'children do not lie.' [As a result,] deputies generally did not question the children's statements, and they responded positively to the victims' statements only when the children revealed new allegations or said something to reinforce their previous allegations. They applied pressure on the children to name additional suspects and victims, and questioned them with inappropriate suggestions that produced the answers they were looking for.[21]

Some deputies gave positive reinforcement, such as "good girl" to the children's responses, instead of a neutral response such as 'okay'. This type of response encourages children to say things they think the interviewer wants to hear, and affects the

> direction of the interview.... [O]n occasion, they demanded answers from the children in a threatening manner."[22]

The Attorney General's report concluded that pressure exerted by interviewers "could have influenced the children's responses and affected their memories of past events. It was most likely a factor in the way the number of victims, suspects, and allegations grew during the course of the investigation."[23]

Others involved in the Satanic Ritual Case were also highly critical of the county's handling of the case. In a visitation hearing held for alleged child victim Michael Nokes, Superior Court Judge

[21] Kern County Report, p. 25.

[22] Kern County Report, p. 28.

[23] Kern County Report, p. 30.

Robert T. Baca stated on the record that the treatment of Nokes by county officials "was the most reprehensible thing that has ever come to my attention."[24] In an earlier visitation hearing, Judge Baca also stated that caseworkers had "brainwashed" the boy and had severely damaged him psychologically. "The molestation, if there was," Judge Baca stated,

> is not what caused this warped child. For the sake of the prosecution's case, this child was taken into the system and completely warped.[25]

- At a Nevada pre-school in 1984, a grand jury returned five indictments against three defendants alleging 69 counts of child sexual abuse involving 26 alleged child victims. The indictments against two defendants were eventually dismissed and a writ of mandamus was granted with respect to the third defendant after independent experts were called in at the insistence of defendants to evaluate the "evidence." Both the independent experts and the reviewing courts found serious inconsistencies and violations of the defendants' constitutional rights, including the failure of the prosecution to present substantial exculpatory evidence to the grand jury, conflicts of interest involving the examining therapists, and contamination of testimony.

Among the various types of contamination errors found by independent experts were

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[24] In the matter of Michael John Nokes, a Minor, State Superior Court, County of Kern, April 25, 1986, Hearing Transcripts, p. 23.

[25] In the matter of Angela and Michael Nokes, State Superior Court, County of Kern, April 25, 1986, Hearing Transcripts, p. 120. See also, Ross, A.S., "Warped Child, Twisted Justice," *San Francisco Examiner*, September 28, 1986, p. A8.

> (1) the interviewers either consciously or unconsciously followed a preconceived agenda, i.e. assumed facts, coerced the child, ignored the child's information, led the child, etc., (2) concertizing, i.e. where, as a result of having to repeat the allegations or being exposed to repetitive leading discussions, the child's memories of the event come from sources other than the event itself, (3) cross-contamination, i.e. using information gained from a source other than the child to question the child, and (4) systems contamination, i.e. contamination from influences outside the mental health sessions -- interactions with police, parents, or the media.[26]

Furthermore, the Court found that the evidence which the prosecution had withheld from the grand jury would have tended "to explain away the charges."[27] "The prosecution," the Court stated

> presented evidence to the grand jury that numerous children were sexually assaulted, either vaginally or anally. The testimony presented indicated that complete penetration had occurred and, in some instances, occurred more than once. At the time of its presentations, the prosecution possessed reports submitted by physicians who had examined the children. None of the physicians found any indicia of sexual penetration. The prosecution did not present these reports to the grand jury.[28]

With respect to the prosecution's failure to inform the grand jury that the examining therapists' children were among the alleged victims and that they stood to benefit monetarily from civil suits

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[26] Nevada v. Babayan, et al., Nos. 18713, 18732, Supreme Court of the State of Nevada, *per curiam* opinion, filed March 1, 1990, p. 7.

[27] Nevada v. Babayan, p. 22.

[28] Nevada v. Babayan, p. 21.

which were being preparted, the Nevada court ruled:

> By presenting as witnesses therapists with obvious conflicting interests without informing the grand jury of such conflicts, the District Attorney's Office undermined the purpose and function of the grand jury which is to assure that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons [cites omitted].[29]

- In January, 1985, five Sacramento, California men were indicted and jailed after six children told social workers and police of sex abuse, ritualistic abuse, and pornographic movies that involved the killing of three children on camera. All charges were eventually dropped. In dismissing charges against two of the defendants, the court found that two of the alleged child victims had been forced by their grandmother to give false testimony. The court stated:

> Without doubt, great harm and suffering was imposed on these children as a result of the conduct of Mrs. Bell [the grandmother of the children]. She is a very intelligent woman. She speaks well and writes in an articulate manner. She is also severely mentally ill.... I have concluded that, while Mrs. Bell appeared from her testimony not to recognize the harmful nature of her actions, the results of her conduct relating to her grandchildren were very damaging.... [emphasis in original][30]

> The testimony of both Dill children, Erika and Heather, was that the many stories of sexual abuse and other terrible

[29] Nevada v. Babayan, pp. 13-14.

[30] California v. Baker, et al., No. 85F-00135, Municipal Court, Sacramento Municipal Court District, City of Sacramento, State of California, *Ruling*, dated October 25, 1985 (Robie, R.B., Judge), p. 6.

> occurrences were agreed to by the children because they were just tired of being badgered by their Grandmother.[31]

> [Mrs. Bell] had no sensitivity toward children or their needs and seemed totally obsessed with matters sexual. When she told the Court that 3-3/4 year old Brian had a sexual look on his face and interrogated Heather about whether the alleged molest felt good, the perversity of her mental condition was glaringly apparent and was never refuted.[32]

The extent to which children are vulnerable to pressure from adults is glaringly apparent from the testimony of Erika Dill, one of the alleged child-victims, excerpts of which are reproduced below.[33] As the court noted, neither the children's mother, nor "a variety of others, including health professional and law enforcement officials, were able to recognize or do anything about the senseless harm being done to these children" by their grandmother[34], who interrogated the children for "a period of many months," sometimes daily, up to four hours at a time.[35] "It is hard to imagine any adult," Judge Ronald Robie wrote, "let alone a child, who could withstand such an interrogation."[36]

[31] California v. Baker, p. 6.

[32] California v. Baker, p. 10.

[33] California v. Baker, pp. 7-9.

[34] California v. Baker, p. 10.

[35] California v. Baker, p. 11.

[36] California v. Baker, p. 11.

Q. Why did you tell her that?
A. 'Cause she kept -- she kept harassing me. She kept saying, 'are you sure,' and stuff and I didn't want to keep going on with it, so I said yes. (page 122, lines 25-28)

* * *

Q. Did you ever tell anybody that you were ever taken to a house called Veryl's house?
A. Yes.
Q. And why did you tell somebody that?
A. Because my Grandma kept harassing me. (p. 123, lines 4-8)

* * *

Q. How were you able to describe what Veryl's house looks like if you never had really been there?
A. I just made it up. (p. 124, lines 23, 24)

* * *

Q. Why -- Erika, why did you tell your Grandma Doris about Cindy and Mindy being involved if they weren't?
A. Because she kept asking me, umm, 'Where there any other children?' and I said 'No,' and she kept asking and asking. (p. 133, line 6-10)

* * *

Q. Erika, why did you tell all those people that those three men had done bad things to you if they had not done bad things to you?
A. Because, when my Grandma started questioning me, she started, umm, harassing me.
Q. What do you mean 'harassing?'
A. She would keep asking, 'Are you sure?', and kept asking and asking a lot. (p. 139, line 26; p. 140, lines 1-5)

* * *

Q. Why did you tell your Grandma that?
A. Because she kept --'cause when she asked me, umm, she, she caught me in the living room and then she said, umm, 'Did' umm, 'anyone have any cameras,' and I said, 'No,' she

kept saying, 'Are you sure,' and kept asking me that, and I didn't like it and I wanted to get over with it to go outside so I said 'yes'. (p. 149, line 20-26)

* * *

The importance of a face-to-face assessment by the trier of fact also becomes clear in the Baker case. Called upon to make an assessment of the testimony given by the various witnesses, the court noted:

> Finally, and most importantly, Mindy and Cindy Dillon, both of whom were identified by Dana as being present and participating in the murders and molestation, denied that any such murders or molestation ever occurred. I found Mindy and Cindy Dillon to be credible witnesses; I carefully viewed their demeanor on the stand. Their testimony is clear.[37]

In evaluating conflicting statements of another alleged child victim, the court observed that her testimony "seemed tentative and lacked the strength of conviction of her other responses."[38] Based on all the testimony given and evidence presented and the observation by the trier of fact of the witnesses, all charges against the defendants were dismissed.

- In an acrimonious visitation proceeding in New Brunswick, New Jersey in 1987, the Court found that an "abuse validator," Eileen Tracy, had manipulated a five-year-old boy into alleging that he had been sexually abused by his father and grandparents. In awarding the father visitation rights, the Court ruled:

I am convinced that Ms. Tracy would have been able to elicit

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[37] People v. Baker, p. 17.

[38] People v. Baker, p. 12.

> the disclosure she elicited from Justin from many children his age who had not been sexually abused.... [H]er interview technique was subtley but powerfully leading and her conclusions spurious but misleading. Everyone seems to agree that Justin is a child who likes to please people, who was easily able to discern what Ms. Tracy wanted to hear and what she in fact was leading him to say, and he complied by making the charges he knew would bring approval.[39]

- In another case in Bakersfield, California, concurrent with the "Satanic Ritual Case" described above, three children testified that they and three other children were forced to perform sexual acts with over a dozen different adults and to participate in drug-taking, torture, and bizarre rituals which were allegedly filmed and photographed. No photographs or films were ever recovered and no corroborative evidence was ever offered with respect to the strange rituals that allegedly occurred at the homes of two of the defendants. Although three children testified at trial that the events never occurred, on August 2, 1985, seven defendants were convicted on literally hundreds of counts of sexual abuse.[40] They were later sentenced to a total of 2,600 years in prison.

The Pitts case demonstrates how a child, once outside the inquisitorial environment created by prosecution teams and/or caseworkers, may recant his or her false testimony. At *habeas corpus* hearings held on June 26 through 30th and July 12 through

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[39] Wolpert v. Wolpert, Transcript of Proceedings, Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, New Brunswick, New Jersey, Docket No. M6513-83, July 15, 1987, Hon. M. Epstein, J.S.C.

[40] See People of the State of California v. Pitts, et al., Superior Court Nos. 27651, 27774, and 28244, Kern County Superior Court. The jury verdict was rendered in a consolidated trial.

14, 1989, alleged child victim Christina Hayes stated that she had testified falsely at petitioner's trial, that none of the molestations to which she attested ever took place, and that she was never molested by any of the petitioners at any time.[41] She also testified that over a period of months the social worker in charge of the case, Carol Darling, and other investigators had made her believe that the defendants were "bad people" and that if she did not say that she had been molested, she might be taken from her father and placed in a foster home.[42] Two other children in the case had also recanted, one of them in the Spring of 1987, long after the defendants were convicted.[43] The defendants' attorney also discovered in the *habeas corpus* hearings that substantial exculpatory evidence was withheld by the prosecution and that certain expert testimony was patently false.[44]

The defendants' petition for *habeas corpus* is currently pending. It should be noted that the children in the Pitts case testified at trial behind a podium which allowed the jury to view the witnesses but denied a face-to-face confrontation with the defendants. That arrangement was made by the trial court after alleged victim Christina Hayes complained that she did not want to have to look at the

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[41] In the Matter of the Writ of Habeus Corpus of Pitts, et al., Nos. 3676, 3703, 3704, 3705, 3706, 3707, and 3708, transcripts of hearings held June 26-30 and July 12-14, 1989, Superior Court of the State of California, County of Kern (hereinafter Habeas Corpus Proceedings Transcript), p. 288.

[42] Habeas Corpus Proceedings Transcripts, p. 302.

[43] Petitioner's Brief, p. 156.

[44] See Petitioner's Brief, which contains frequent cites from the Habeas Corpus Proceedings transcripts.

defendants.[45] The lack of face-to-face confrontation between the alleged victims and the accused is one among many grounds upon which the defendants have taken a direct appeal of their case, now pending, to the Court of Appeals of the State of California, 5th District.[46]

III. The right of an actual face-to-face confrontation at trial between the accused and his or her accusers forms the core of the Confrontation Clause. Given the real possibility of false accusations, this right must not be abrogated.

A face-to-face confrontation between the accused and his or her accuser is guaranteed by the very wording of the 6th Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Whether or not, as Justice Harlan wrote in California v. Green, 399 U.S. 149, 174 (1970), the right of confrontation "comes to us on faded parchment," the right of confrontation has a solid basis in American jurisprudence. As this Court has held previously, face-to-face confrontation between the accuser and accused is "essential to a fair trial in a criminal prosecution," Pointer v. Texas, 380 U.S. 400 (1965); see also Commonwealth of Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ["The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him and the right to conduct cross-examination"].

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[45] Reporter's Trial Transcripts, pp. 1433-34, California v. Pitts, et al., Superior Court Nos. 27641, 27774, 28244, Kern County Superior Court, 1985.

[46] California v. Pitts, et al., 85 Crim. F-006225, 5th District Court of Appeals, Fresno, California.

The rationale for the right of confrontation is threefold, namely, it

> (1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. California v. Green, 399 U.S. 149, 158 (1970).

Furthermore, as this Court held in Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988), the right of confrontation is a "core guarantee" which "serves the general perception that confrontation is essential to fairness and helps to ensure the integrity of the fact-finding process by making it more difficult for witnesses to lie." Accord, Mattox v. United States, 156 U.S. 237, 242-3, 15 S.Ct. 337, 339-40 (1895) [The Confrontation Clause affords the accused "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and gauge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"]; Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985) [Case law "reflects the Court's long-standing recognition that the 'literal right to confront' the witness at the time of trial...forms the core of the values furthered by the Confrontation Clause"].

There is no reason to believe that the fact-finding process in cases involving child witnesses is any different from that involving adults. In fact, as anyone who has raised children is well aware, children not only have the capacity to lie that is equal to that of adults, but (as the cases above show) they are more vulnerable than

adults to gross or subtle manipulation. It is because false accusations of child abuse are often generated in a "supportive" environment designed to confirm and solidify findings of abuse and in which any opposition or challenge to the child's statements may be followed by suspicion, denial, derision, and increased attempts to shield the child from the exigencies of the adversarial process, that the accused's right of confrontation is paramount. Indeed, confrontation in the courtroom may be the only opportunity in certain cases to "ensure the integrity of the fact-finding process."

The Maryland statute in question in the instant case, Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989 Repl. Vol.), requires case-specific findings that the child witness would suffer "serious emotional distress" which would result in the child's being unable reasonably to communicate prior to the employment of the one-way closed circuit television system. Notwithstanding such requirements, no evidence has been adduced to demonstrate the necessity for so drastic an action, which necessarily obliterates the defendant, jury, and courtroom from the child-witness' sight, and so abrogates a fundamental right granted the accused under the 6th Amendment. For instance, Petitioner has not shown why the one-way close circuit television is necessary when there are other systems -- such as a two-way closed circuit television system -- which may both satisfy the accused's right of confrontation and afford the child-witness the requisite level of protection.[47] In a field which as volatile as that of child sexual abuse, *Amicus* believes that the rights of the accused must be strictly interpreted and preserved.

[47] *Amicus* does not offer its opinion at this stage as to whether a two-way closed circuit television or some other system would satisfy the requirements of the Confrontation Clause. There may, in fact, be such a system and a constitutionally sound law authorizing its use, but that is not the case here.

Amicus believes this Court should again be mindful, as it was in Coy, that

> face-to-face pressure may, unfortunately, upset the truthful rape victim or abused child; but by the same token, it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. Coy v. Iowa, supra, 108 S.Ct. at 2802.

Thus, while *Amicus* joins Petitioner in expressing its concern for the well-being of child witnesses who are called to testify against those who have allegedly brought them harm, *Amicus* submits that we must not hastily adopt ill-considered protective methods and strategies which abrogate time-honored rights. In this respect, a one-way closed circuit television cannot satisfy the requirements of the Confrontation Clause and must be found to be constitutionally prohibited.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Maryland, declaring Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989 Repl. Vol.) to be unconstitutional, should be affirmed.

Respectfully Submitted,

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